TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 221.

THE F. G. OXLEY STAVE COMPANY AND F. G. OXLEY, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF BUTLER, THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, AND THE ST. FRANCIS LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED FEBRUARY 11, 1895.

(15,787.)

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The County of Butler, The St. Louis, Iron Mountain & Southern Railway Company, and The St. Francis Lumber Company, appellants, and The F. G. Oxley Stave Company and F. G. Oxley, trustee, respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or

2 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

2½ [Endorsed:] Filed January 14th, 1895. Jan. 14, '95. Jno. R. Green, cl'k.

Return to Writ.

STATE OF MISSOURI, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the supreme court of the State of Missouri, at the city of Jefferson, this 7th day of February, A. D. 1895.

Seal of the Supreme Court of Missouri.

JNO. R. GREEN, *Clk.*

3 UNITED STATES OF AMERICA, *ss:*

To The County of Butler, The St. Louis, Iron Mountain & Southern Railway Company, and The St. Francis Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, witnin 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The F. G. Oxley Stave Company and F. G. Oxley, trustee, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

3½ [Endorsed:] Filed January 14th, 1895. Jan. 14, '95. Jno. R. Green, cl'k.

I acknowledge service of the within this 12th day of January, A. D. 1895, for defendant St. Louis, Iron Mountain & Southern Railway Company.

MARTIN L. CLARDY,
Att'y for said Defendant.

3¾ Office of clerk of the circuit court, Jefferson county. C. R. Honey, clerk.

Court terms: Second Mondays in January, May, and September.

HILLSBORO, MO., 14*th Jan'y*, 1895.

Isaac H. Lionberger, Esq.

DEAR SIR: Yours of 12th inst., with enclosures, received. I herewith return to you the copy of citation and the acknowledg-

ment of the service intended for me. I do not feel authorized to acknowledge service for Butler county.

Yours truly, LOUIS F. DINNING.

Cir. ct. is in session here.

4 UNITED STATES OF AMERICA, *ss:*

To The County of Butler, The St. Louis, Iron Mountain & Southern Railway Company, and The St. Francis Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The F. G. Oxley Stave Company and F. G. Oxley, trustee, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

On this 17th day of January, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me the subscriber, Isaac H. Lionberger, and makes oath that he delivered a true copy of the within citation to Louis F. Dinning, attorney of record for Butler county, in the State of Missouri, on the 14th day of January, 1895.

ISAAC H. LIONBERGER.

Sworn to and subscribed the 17 day of January, *17* A. D. 1895.

[Seal of George M. Block, Notary Public, City of St. Louis, Missouri.]

GEORGE M. BLOCK,
Notary Public, City of St. Louis, Missouri.

I acknowledge service of the within citation this 14th day of January, 1895.

L. D. GROVE,
Attorney for St. Francis Lumber Company.

[Endorsed:] Filed Jan. 18, 1895. Jno. R. Green, clerk.

5 Copy.

UNITED STATES OF AMERICA, *ss:*

To The County of Butler, The Saint Louis, Iron Mountain & Southern Railway Company, and The St. Francis Lumber Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The F. G. Oxley Stave Company and F. G. Oxley, trustee, are plaintiff-in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) DAVID J. BREWER.
Associate Justice of the Supreme Court of the United States.

On this seventeenth day of January, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — day of ——, A. D. 189–.

—— ——.

I acknowledge service of the within citation this 17th day of January, 1895.

WM. A. SPENCE,
County Clerk.

STATE OF MISSOURI, }
Butler County. }

I, James R. Hogg, do hereby certify that I served the within writ by reading the same to William A. Spence, clerk of county court of Butler county aforesaid, and by delivering to him as such clerk a true copy of the within writ this seventeenth day of January, A. D. 1895.

JAMES R. HOGG,
Sheriff Butler Co., Mo.,
By D. B. DEEM, *Deputy.*

Fee, $1.00, paid.

Filed January 22nd, 1895.

JNO. R. GREEN, *Clk.*

6 UNITED STATES OF AMERICA, *ss:*

To The County of Butler, The St. Louis, Iron Mountain and Southern Railway Company, and The St. Francis Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The F.

G. Oxley Stave Company and F. G. Oxley, trustee, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

I acknowledge service of the within citation this fourteenth day of January, 1895.

L. D. GROVE,
Attorney for St. Francis Lumber Company.

I acknowledge service of the within citation this 19th day of January, 1895.

HENRY N. PHILLIPS,
Att'y and of Counsel for Butler County.

[Endorsed:] Filed January 22nd, 1895. Jno. R. Green, cl'k.

7 In the Supreme Court of the United States.

FREDERICK G. OXLEY and THE F. G. Oxley Stave Company, Plaintiffs in Error, *vs.* THE COUNTY OF BUTLER, THE ST. LOUIS, Iron Mountain and Southern Railroad Company, and The St. Francis Lumber Co.	In Error to the Supreme Court of the State of Missouri.

October Term, 1894.

Assignment of Errors.

On the seventh day of January, 1895, of the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Frederick G. Oxley and the F. G. Oxley Stave Company, by J. W. Warrington and Isaac H. Lionberger, their attorneys, and said that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the supreme court of the State of Missouri erred in refusing to vacate and annul the decree of the circuit court of Butler county in the suit of Butler County against The Cairo and Fulton Railroad Company and John Moore, John Wilson, and Albert G. Waterman, trustees, upon the ground that before said suit was begun and before said decree was rendered two of the defendants therein, to wit, John Moore and Albert G. Waterman, had died.

Second. That said court erred in refusing to vacate said decree upon the ground that before said suit was brought and before said decree was rendered one of the defendants, to wit, The Cairo and Fulton Railroad Company, had been dissolved.

8 Third. That said court erred in refusing to vacate and annul said decree on the ground that the directors of the Cairo and Fulton Railroad Company were not made parties defendant in the said suit and summoned to appear.

Fourth. That said court erred in refusing to vacate and annul said decree upon the ground that Mason Brayman, trustee and successor to Albert G. Waterman, deceased, was not made a party defendant in said suit and summoned to appear, and that John Wilson, the sole surviving trustee, was not notified by summons served, but by publication only.

Fifth. That said court erred in approving, ratifying, and establishing the decree of the circuit court of Butler county aforesaid, notwithstanding the death and defect of parties aforesaid, thereby depriving the plaintiffs of property without due process of law.

Sixth. That said court erred in refusing to vacate and annul said decree upon the ground that it deprived the defendants in said suit and the plaintiffs in error claiming under them of property without due process of law.

Seventh. That said court erred in refusing to recognize and give effect to the title of plaintiffs acquired by adverse occupancy of the lands involved for the period prescribed in the statute of limitation of the State of Missouri.

Eighth. That said court erred in dismissing the suit of the plaintiffs in error, whereas by the law of the land its judgment ought to have been given for the said plaintiffs and against the defendants, and there is no ground upon which the judgment of the supreme court can be sustained, except that the decree aforesaid is valid and effectual.

9 And the said Frederick G. Oxley and the F. G. Oxley Stave Company pray that the judgment of the supreme court of the State aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by reason of the said judgment.

ISAAC H. LIONBERGER,
J. W. WARRINGTON,
Attorneys for Plaintiffs in Error.

9½ [Endorsed:] F. G. Oxley *et al.*, plaintiffs in error, *vs.* Butler County *et al.*, def'ts in error. Error to the supreme court of Missouri. Assignment of errors. Filed January 14th, 1895. Jan. 14, '95. Jno. R. Green, cl'k. I. H. Lionberger, J. W. Warrington, att'ys for pl'ffs in error.

10 STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 18th day of February, 1892, there was filed in the office of the clerk of the supreme

court of the State of Missouri a certified copy of the judgment and order granting the appeal as provided by section 2253, R. S. 1889, in the case of The F. G. Oxley Stave Company and Frederick G. Oxley, trustee, respondents, against The County of Butler, in the State of Missouri, *et al.*, appellants; which said certified copy of the judgment and order granting an appeal is in words and figures as follows, to wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss*:

Be it remembered that at the June term, A. D. 1891, of the circuit court of the city of St. Louis within and for the city of St. Louis and State aforesaid, and on the sixth day of July, A. D. 1891, being the seventeenth day of the June term, 1891, the following proceedings were had in a certain cause then pending in the said court, wherein F. G. Oxley Stave Company and Frederick G. Oxley, trustee, are plaintiffs and The County of Butler, St. Francis Lumber & St. Louis, Iron Mountain & Southern Railway Co. and others are defendants, to wit:

MONDAY, *July 6th*, 1891.

THE F. G. OXLEY STAVE CO. and FREDERICK G. OXLEY, Trustee, *vs.* THE COUNTY OF BUTLER, IN THE STATE OF MISSOURI, *et al.* } 82863.

The court, having heretofore taken this cause under advisement and being now sufficiently advised of and concerning the premises, finds the issues therein joined in favor of the plaintiffs.

Thereupon it is ordered, adjudged, and decreed by the court, first, that the plaintiffs are in possession of and have good and perfect title in fee-simple to the following-described lands in the county of Butler, in the State of Missouri—that is to say,
11 the W. ½ and S. E. ¼, W. ½ & S. E. ¼ of N. E. ¼ of section one (1), containing 600 acres; all of section two (2), containing 640 acres; the E. ½ & S. W. ¼ & S. ½ N. W. ¼ of section three (3), containing 560 acres; the N. W. ¼ & N. ½ & S. E. ¼ of S. E. ¼ of section four (4), containing 280 acres; the E. ½ & S. W. ¼ of S. E. ¼ of section eight (8), containing 120 acres; the E. ½ & S. W. ¼ & E. ½ N. W. ¼ of section nine (9), containing 560 acres; the E. ½ N. E. ¼ & W. ½ N. W. ¼ & S. E. ¼ & S. ½ S. W. ¼ of section ten (10), containing 240 acres; the N. W. ¼ of section eleven (11), containing 160 acres; the E. ½ of section & N. ½ & S. E. ¼ of N. W. ¼ & E. ½ & S. W. ¼ of S. W. ¼ of section fifteen (15), containing 560 acres; S. E. ¼ & W. ½ & S. E. ¼ of N. E. ¼ of section seventeen (17), containing 280 acres; all of section twenty-one (21), containing 640 acres; the E. ½ of section twenty-two (22), containing 320 acres; the W. ½ of section twenty-three (23), containing 320 acres; the N. ½ N. W ¼ & W. ½ N. E. ¼ & S. E. ¼ N. W. ¼ & E. ½ & S. W. ¼ of S. E. ¼ & N. ½ & S. W. ¼ of section twenty-five (25), containing 440 acres; the N. E. ¼

& S. W. ¼ & N. W. ¼, S. E. ¼ & W. ½ & S. E. ¼ of N. W. ¼ of section twenty-six (26), containing 480 acres; all of section twenty-seven (27), containing 640 acres; all of section twenty-eight (28), containing 640 acres; lots one (1) & two (2) of the N. W. ¼ & lots 1, 2, & 3 of the S. W. ¼ & lots 1, 2, & 3 of S. E. ¼ & W. ½ & S. E. ¼ of N. E. ¼ of section thirty-one (31), containing 737.99 acres; all of section thirty-two, containing 774.23 acres; all of section thirty-three (33), containing 772.10 acres; the N. ½ of section & lots 1, 2, & 3, S. E. ¼ & lot 1 & E. ½ lots 2 & 3 S. W. ¼ section thirty-four (34), containing 691.05 acres; the N. E. ¼ N. E. ¼ & N. ½ & S. W. ¼ of N. W. ¼ & W. ½ lot 1 & all of lots 2 & 3 S. E. ¼ & lots 2 & 3 S. W. ¼ of section (35), containing 467.33 acres, all in township twenty-two (22) north, of range seven (7) east; the N. ½ & S. E. ¼ & W. ½ & S. E ¼ S. W. ¼ section (1), containing 521.87 acres; lot 2 & W. ½ lot 1 N. E. ¼, lots 1 & 2 N. W. ¼ & N. ½ & S. E. ¼ of S. E. ¼ & N. W. ¼ S. W. ¼ & S. E. ¼ S. W. ¼ of section 2, containing 485.02 acres; lots 1 & 2 N. E. ¼ & lots 1 & 2 N. W. ¼ & W. ½ & N. E. ¼ of S. E. ¼ and S. W. ¼ of section 3, containing 618.46 acres; the N. W. ¼ & S. E. ¼ of N. E. ¼ & N. E. ¼ of S. E. ¼ & S. ½ of S. E. ¼ and all S. W ¼ sec. 11, containing 400 acres; N. ½ & N. ½ & S. E. ¼ of S. E. ¼ & S. W. ¼ S. W. ¼ of section 13, containing 480 acres; the E. ½ & S. W. ¼ of N. E. ¼ & N. ½ & S. W. ¼ of N. W. ¼ & all of S. W. ¼ of section 14, containing 480 acres; all of S. E. ¼ of section 15 lying east of Black river, containing 96.70 acres; the E. ½ & S. W. ¼ of N. E. ¼ & W. ½ & S. E. ¼ of N. W. ¼ & E. ½ & N. W. ¼ of S. E. ¼ & N. ½ S. W. ¼ section 25, containing 440 acres; all of section 27, containing 640 acres; S. E. ¼ of section 32, containing 160 acres; the N. E. ¼ S. E. ¼ section 33, containing 40 acres; the S. ½ & N. E. ¼ & S. ½ N. W. ¼ sec. 36, containing 560 acres; the S. ½ S. E. ¼ section 23, containing 80 acres; all of section 26, containing 640 acres; the S. E. ¼ N. E. ¼ & S. ½ N. W. ¼ S. W. ¼ S. ½ S. E. ¼ & N. W. S. E. ¼ section 33, containing 284 acres; the N. ½ & N. ½ S. W. ¼ section 34, containing 400 acres, all in township 23 north, of range 7 east; the N. W. ¼ & lots 1, 2, & 3 of S. E. ¼ & lots 1, 2, & 3 S. W. ¼ sec. 35, containing 592 acres, in township twenty-two (22) north, of range 6 east; all of section 5, containing 614.09 acres; lots 1, 2, 3, & 4 of S. E. ¼, lots 5 & 6 of N. E. ¼ of section 7, containing 239.09 acres; the N. W. ¼ & N. W. ¼ of N. E. ¼ section 8, containing 200 acres; the east half of section 11, containing 320 acres; all of section 12, containing 640 acres, all of section 13, containing 640 acres; the west half of section 22, containing 320 acres; the E. ½ of section 23, containing 320 acres; all of section 24, containing 640 acres; all in township 22 north, of range 7 east; lots 1 & 2 & N. E. ¼ & W. ½ lots 1 & 2 N. W. ¼ of section 1, containing 240 acres; the N. ½ & S. E. ¼ & N. ½ S. W. ¼ section 11, containing 560 acres; the S. ½ & N. W. ¼ & S. ½ & N. W. ¼ of N. E. ¼ section 13, containing 587.20 acres; the W. ½ & W. ½ of E. ½ & N. E. ¼ N. E. ¼ & S. E. ¼ S. E. ¼ section 15, containing 546.70 acres; the E. ½ & S. W. ¼ of section 23; the S. E. ¼ & N. ½ N. W. ¼ of section 25, containing 240 acres; the N. ½ & S. W. ¼ section 35, containing 480 acres; the N. E. ¼ N.

12

13

E. ¼ of section 13, containing 40 acres; the N. ½ & S. E. ¼ & N. ½ & S. E. ¼ of S. W. ¼ of section 21, containing 600 acres; the S. W. ¼ of N. W. ¼ & N. ½ S. W. ¼ section 25, containing 120 acres; the E. ½ & N. E. ¼ S. W. ¼ section 34, containing 360 acres; the W. ½ S. E. ¼ section 35, containing 80 acres; the W. ½ N. E. ¼ & N. W. ¼ & S. E. ¼ & N. E. ¼ & S. W. ¼ of section 36, containing 480 acres, all in township twenty-four (24) north, of range seven (7) east; the whole of section 6, containing 640 acres; the N. ½ & S. E. ¼ of section 19, containing 480 acres; lots 4, 5, 6, 7, & 8 in section 29, containing 151.99 acres; all of section 7, containing 649.92 acres; lots 1 & 2 S. W. ¼ section 19, containing 167.20 acres; lot 2 in section 29, containing 35.76 acres; all of section 31, containing 813.34 acres, all in township 22 north, of range (8) east; lots 1, 2, 3, & 4, in section 1, containing 140 acres; lots 1 & 2 N. E. ¼ & lots 1 & 2 N. W. ¼, in section 3, containing 215.70 acres; the E. ½ S. W. ¼ & S. E. ¼ & lots 1 & 2 N. E. ¼ and E. ½ lots 1 & 2 N. W. ¼ of section 4, containing 463.28 acres; the S. E. ¼ S. E. ¼, W. ½ of lots 1 & 2 N. W. ¼, & lots 1 & 2 S. W. ¼, lot 1 & E. ½ lot 2 N. E. ¼, & N. ½ S. E. ¼, W. ½ lot 2 N. E. ¼, E. ½ lots 1 & 2 N. W. ¼, & S. W. ¼ S. E. ¼, in section 6, containing 640 acres; the W. ½ N. W. ¼ & W. ½ S. W. ¼ & E. ½ of sec. & E. ½ N. W. ¼ & E. ½ S. W. ¼ of section 9, containing 640 acres; the N. ½ N. E. ¼ & N. ½ N. W. ¼ of section 14, containing 160 acres; the E. ½ & S. W. ¼ & N. W. ¼ section 20, containing 640 acres; all of section 21, containing
14 640 acres; the W. ½ & N. W. ¼ N. E. ¼ in section 22, containing 360 acres; the E. ½ N. W. ¼ & E. ½ S. W. ¼ & lots 5, 6, 7, 8, 9, & 10 & W. ½ N. W. ¼ in section 23, containing 553.50 acres; the W. ½ S. W. ¼ & S. E. ¼ S. W. ¼ & lots 3, 5, & 6 & S. E. ¼ N. E. ¼ & N. E. ¼ & N. E. ¼ N. W. ¼ sec. 27, containing 303.45 acres; N. ½ N. E. ¼ & S. W. ¼ N. E. ¼ & W. ½ of section 28, containing 440 acres; all of section 29, containing 640 acres; all of section 30, containing 639.46 acres; the N. E. ¼ & lots 2 of S. W. ¼ & lot 2 & N. ½ lot 1 N. W. ¼ sec. 31, containing 360 acres; N. ½ & S. E. ¼ of S. E. ¼ of section 32, containing 360 acres; the N. ½ of section 33, containing 320 acres; the N. W. ¼ of section 34, containing 160 acres, all in township twenty-three (23) north, of range eight (8) east; the S. ½ & lots 1 & 2 N. W. ¼ of section 5, containing 469.68 acres; the N. W. ¼ of S. E. ¼ & N. E. ¼ of section 17, containing 200 acres; the N. E. ¼ & W. ½ S. E. ¼ of section 21, containing 240 acres; the S. E. ¼ N. E. ¼ & S. E. ¼ S. E. ¼ & S. E. ¼ S. W. ¼ sec. *sec.* 29, containing 120 acres; the W. ½ N. E. ¼ & lot 2 & S. ½ lot 1 of N. W. ¼ of section 32, containing 200 acres; the S. W. ¼ of section 32, containing 40 acres, & N. E. ¼ of N. E. ¼ of section 31, containing 40 acres, all in township twenty-four (24) north, of range eight (8) east; lots 1, 2, & 5, in section 5, containing 113.75 acres; lots 3, 4, & 5, in section 8, containing 110.15 acres; lots 1, 4, 5, & 6, in section 28, containing 154.95 acres; lots 1 & 4, in section 21, containing 94 acres; the S. ½ lot 2 of S. W. ¼ section 31, containing 39.60 acres; lots 3 & 5, in section 21, containing 85.90 acres; all of section 29, containing 637.50 acres; the N. E. ¼ of N. E. ¼ (except 1 square acre owned by school district) & W. ½ S. E. ¼ & lots 1 & 2

N. W. ¼ & lot 1 & N. ½ lot 2 S. W. ¼ of section 31, containing 392.70 acres; the S. W. ¼ & lots 1, 2, 3, 4, 5, 6, & 7, in section 33, containing 399.10 acres, and lots 2, 3, 6, 7, 8, 9, & 10, in section 34, containing 262.05 acres, all the last above described lands being
15 in township twenty-five (25) north, of range eight (8) east.

Second. That the defendants Ann R. Allen, William R. Allen, George W. Allen, Thomas Allen, Elizabeth R. Donaldson, William R. Donaldson, Anne L. Allen, Alice Maud Atwater, Charles Atwater, Helen G. Allen, Anne R. Allen having disclaimed any interest or title in the lands aforesaid or any part thereof, said defendants and each of them are forever estopped and precluded from hereafter claiming any right, title, or interest in or to said lands or any of them adverse to the plaintiffs or those claiming by, through, or under them, and that the petition be dismissed as to said defendants, and that said defendants recover of the said plaintiffs their costs.

Third. That the claims of the defendants Charles F. Heinrichs, The Unknown Heirs of Benjamin P. Moore, Deceased; Evan B. Day, Hattie Spinney, Loring Bartlett, Herman Bader, John C. Tunnison, Julia C. Tunnison, Jonathan Woodruff, E. K. Pitcher, E. P. Bates, and Joshua Hill to any part of the lands aforesaid growing out of sales by the sheriff of the county of Butler made on the 25, 26, and 27th days of September, 1867, under executions issued on judgments rendered against the Cairo and Fulton Railroad Company of Missouri by the circuit court of the county of Mississippi, in the State of Missouri, in or about the year 1863, are without validity, force, or effect as against the title of the plaintiffs.

It is further ordered and decreed that all deeds of conveyance of said lands or any part thereof made by said sheriff in execution of said judgments and all mesne conveyances of said lands or any part thereof to the defendants aforesaid or any of them be cancelled, set aside, and for naught held and esteemed, and that none of said defendants have any right, title, or interest in or to the lands aforesaid or in or to any part thereof.

Fourth. That the decree and judgment of the circuit court of the county of Butler, in the State of Missouri, made on the 2nd day of July, 1869, in a certain suit wherein The County of Butler was plaintiff and The Cairo and Fulton Railroad Company of Missouri, John Wilson, John Moore, and Albert G. Watermann were
16 defendants, vacating and annulling the patent from the State of Missouri, dated April 30, 1867, and the deed of trust made by the said Cairo and Fulton Railroad Company of Missouri on the 23rd day of May, 1857, to said Watermann, Moore, and Wilson is inoperative, ineffectual, and void.

Fifth. That the title and claim of the defendant, the said County of Butler, to the lands aforesaid or any part thereof are invalid and ought not to be permitted to cast a cloud upon the title of the plaintiffs to said lands, and are for naught held and esteemed.

Sixth. That the title and claims of the defendants The St. Louis, Iron Mountain and Southern Railway Company, Catherine Dubbs *et al.*, Bela Mason, George F. Emerson, John M. Hirshey, Chas. F. Hinrichs, William M. Slaymaker, T. J. Van Hardenburg, Stephen

M. Chapman, Samuel Lilly, Green L. Poplin, August Brandt, Henry H. Bedford, J. W. G. Weirman, J. W. Stump, The Keystone Land and Lumber Company, William Morris, Albert H. Fink, The Trustee of the St. Paul Episcopal Church of Ironton, Missouri; A. S. Lee, John W. Forney, William W. H. Kinzer, and John Menzel, Edward Westernmeyer, Chas. M. Howell, Dennis R. Harder, James J. Johnson, Ira E. Loenard, William S. Dewey, John W. Hausett, John McSmith, Albert Miller, The Unknown Heirs of Henry Miller, Deceased; The Unknown Heirs of Daniel B. Miller, Deceased; Thomas Tate, William Gundstoff, Philo E. Baker, John A. Erben, Fred. S. Eason, William Packard, William O. Packard, Harrison G. Packard, Floyd W. Packard, Belzora Fleming and William Fleming, Elizabeth B. Adams (late Ferguson), George Adams, Susan Smith, Alfred Kelley, Melville F. Moore, Catherine S. Hess, Formin W. Markham, David W. Blumeyer, Jacob Weidman, John P. Hutton and Eliza Hutton, John McSperrin and Eliza McSperrin, Benjamin F. Turner, William A. Pence, Thomas Wittington, James F. Tubb, Thomas T. Baldwin, Francis Wittington, Joseph L. Baldwin, John W. Baldwin, Lucy L. Hamilton (late Baldwin), Edward J. Hamilton, William Kenzer, Maggie Kingport (late Kinzer), A. E.
17 Kingport, Maria L. Blair, Gracie Emmons, Lyman Gregory, Edgar Gregory, D. S. Asher, Elkin Pedigo, Isom Keith, Ellen Rhodes, Sarah M. Davidson, The St. Francois Lumber Company, H. G. McCormick, George Abbott, and each of them to the lands aforesaid or to any part of them founded upon conveyances from the county of Butler or its grantees are invalid and are for naught held and esteemed, and all conveyances from Butler county and all mesne conveyances to the defendants aforesaid or any of them are cancelled, set aside, and for naught held and esteemed, and none of said defendants have any right, title, or interest in or to the lands aforesaid or in or to any part thereof.

Sixth. That the plaintiffs have and recover of the defendants herein, except the said defendants, Ann R. Allen, William R. Allen, George W. Allen, Thomas Allen, Elizabeth R. Donaldson, William R. Donaldson, Anne L. Allen, Alice Maud Atwater, Charles Atwater, Hellen G. Allen, and Anne R. Allen, their costs in this behalf incurred, and that execution issue therefor.

And afterwards, at the October term, 1891, of the said circuit court the following further proceedings were had in said cause, to wit:

FRIDAY, *November 27th*, 1891.

F. G. OXLEY STAVE COMPANY *et al.*
vs. } 82863.
THE COUNTY OF BUTLER, IN THE STATE OF MISSOURI, *et al.*

Now, at this day, come the St. Francis Lumber Co., by L. D. Grove, Esq., its attorney, and files an affidavit for an appeal, and on his motion an appeal is allowed said defendant, The St. Francis Lumber Co., to the supreme court of the State of Missouri from the judgment herein rendered.

Now comes R. F. Scott, prosecuting attorney of and agent for Butler County, Missouri, one of the defendants herein, and files an affidavit for an appeal, and on his motion an appeal is allowed said defendant, The County of Butler, in the State of Missouri, to the supreme court of the State of Missouri from the judgment
18 herein rendered.

Now comes St. Louis, Iron Mountain and Southern Railway Co., one of the defendants, by Henry G. Herbel, its agent, and files an affidavit for an appeal, and on his motion an appeal is allowed said defendant, St. Louis, Iron Mountain and Southern Railway Co., to the supreme court of Missouri from the judgment herein rendered.

The said defendant, The St. Louis, Iron Mountain & Southern Railway Company, thereupon files an appeal bond, which is approved by the court.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, Philip H. Zepp, clerk of the circuit court, city of St. Louis, do hereby certify that the above and foregoing contains a true, full, and complete transcript of the judgment and the date thereof and of the order allowing appeals in the above-entitled cause as fully as the same remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court this 11th day of December, 1891.

[SEAL.] PHILIP H. ZEPP, *Clerk.*

And afterwards, to wit, on the 18th day of August, 1893, the said appellants filed their abstract of the record; which said abstract is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1893.

F. G. OXLEY STAVE COMPANY and FREDERICK G. OXLEY, Trustee for the F. G. Oxley Stave Co., Respondents,
vs.
COUNTY OF BUTLER, IN THE STATE OF MISSOURI, *et al.*, Appellants.

19 *Abstract of the Record.*

This is an action to set aside certain deeds brought in the Butler county circuit court and tried in the circuit court of St. Louis city.

The amended petition in said cause is as follows:

Amended Petition.

To the Honorable John G. Wear, judge of the twenty-third judicial district of Missouri, of which the county of Butler forms a part:

Your complainants, The F. G. Oxley Stave Company, a corporation organized under the laws of the State of Ohio and doing busi-

ness in Butler county, in the State of Missouri, and Frederick G. Oxley, trustee, a resident of Cincinnati, in the State of Ohio, would respectfully represent and show unto this honorable court that heretofore, to wit, in the year A. D. 1850, by an act of Congress duly approved September 28th, A. D. 1850, the United States Government granted to the State of Missouri, for the purpose of drainage, among other large tracts and bodies of land, all the lands and real estate hereinafter described; that afterwards, to wit, in the year 1853, the State of Missouri, by an act of its legislature approved February 23, 1853, granted all the said hereinafter-described lands to the county of Butler, in said State.

That afterwards, in the same year, an act was passed by the legislature of said State of Missouri, which act was approved February 24, 1853, whereby any county in said State was authorized to subscribe for the capital stock of any railroad company organized under said act, and any such county so subscribing for such capital stock and having swamp or overflowed lands was authorized to use, sell, or mortgage said lands for the purpose of paying such subscription; that afterwards, to wit, on or about January 12, 1854, said Cairo & Fulton Railroad Company was organized and duly incorporated under said act approved February 24, 1853; that afterwards, to wit, in the year A. D. 1855, the legislature of the State of Missouri passed an act approved December 7th, A. D. 1855, authorizing the county court of said Butler county to subscribe to the capital stock of the Cairo & Fulton R. R. Company and to pay the amount of said subscription in the swamp lands belonging to said county, and that afterwards, to wit, on the 10th day of December, 1855, the State of Missouri, by act of the legislature of that date, provided that it shall be lawful for any county in this State having swamp and overflowed lands to subscribe the same to any railroad company which may pass through said county upon such terms and to be valued at such prices as may be agreed upon by the county court of said county and the directors of said railroad company in which said stock may be taken.

That afterwards, to wit, on the 24th day of October, A. D. 1855, and in pursuance to said grant — the State of Missouri and the power in them vested under and by virtue of the said acts of the General Assembly of the State of Missouri, the county court of Butler county aforesaid subscribed for $50,000 of the capital stock of the Cairo & Fulton R. R. Co., and provided that said subscription be paid out of the swamp lands of said county; that afterwards, to wit, on the 6th day of December, A. D. 1855, the county court of said Butler county, for the payment and satisfaction of the amount of the subscription aforesaid, ordered, directed, and decreed that the swamp land of said county when selected by said R. R. company be sold, transferred, and conveyed to the said Cairo & Fulton R. R. Co. at $1 per acre, and the said county court then and there appointed one Daniel L. Jennings, of said county of Butler, to execute deed or deeds to said company, in due and legal form, to invest the title to said lands in said company, in payment for said stock in said company so subscribed by said county.

That afterwards, to wit, on the 6th day of December, 1855,
21 the district county court of Butler county, by an order duly entered of record in the records of said county, did subscribe for an additional $50,000 of the capital stock of the Cairo & Fulton R. R. Co., and further ordered that alternate sections of the swamp and overflowed lands belonging to the county of Butler be sold and transferred, conveyed, and set over, by deed or deeds, in due form of law, at $1 per acre, to meet and fully pay off said subscription upon execution by said company of a certificate or receipt therefor in due form of law as in cases of other stock subscriptions.

That afterwards and on the 19th of December, in the year A. D. 1856, the said county court ordered and directed the clerk of said court to certify to the State register of lands at Jefferson City, Mo., that full payment had been made by the Cairo & Fulton R. R. Company of Missouri for all the said lands selected in said county of Butler, as per list then on file in the office of said clerk, which said list included all the lands hereinafter described—that is to say, all the following-described lands, being and situated in the said county of Butler and State of Missouri.

(Description of lands omitted by consent.)

That afterwards, to wit, on the 20th day of April, A. D. 1857, the State of Missouri, in pursuance to the law and to said order of the county court of Butler county aforesaid, made its patent conveying to the said Cairo & Fulton Railroad Company all the lands described in said list certified by the county clerk of said county of Butler, including all the land herein specifically set out and described.

That in order to secure the payment of certain bonds of the said Cairo and Fulton R. R. Co. the said company on, to wit, the 23rd day of May, A. D. 1857, conveyed all the lands in this bill of complaint described, together with other lands, to John Moore,
22 John Wilson, and A. G. Waterman in trust to secure the payment of the bonds of said Cairo & Fulton R. R. Company therein described; that afterwards, on, to wit, the 16th day of December, A. D. 1871, Charles P. Chouteau, having previous to that time become owner of the greater portion of the bonds of said Cairo & Fulton R. R. Company secured by the said deed of trust to said John Moore, John Wilson, & A. G. Waterman, filed his petition in the circuit court of Mississippi county, in the State of Missouri, to foreclose said deed of trust and have a decree ordering the sale of the said aforedescribed lands (among others) to satisfy the amount found to be due on said bonds; that the said cause was duly tried in said Mississippi county circuit court and a judgment rendered against the said Charles P. Chouteau and in favor of the defendants in said cause, whereupon the said Charles P. Chouteau caused an appeal to be prosecuted in said cause to the supreme court of the State of Missouri, where said judgment of the said circuit court was reversed and a judgment or decree in said cause was rendered in the supreme court of the State of Missouri foreclosing said deed of trust, and the property therein described was sold under the judgment of said supreme court by a commissioner appointed for that

purpose, and at said sale the said Charles P. Chouteau became the purchaser of all the lands described in this petition.

That afterwards, to wit, on the 19th day of November, A. D. 1886, the said Charles P. Chouteau sold all the lands hereinabove described to the F. G. Oxley Stave Company and conveyed the same, with a large quantity of other real estate, to Frederick G. Oxley, trustee.

That your complainants The F. G. Oxley Stave Company are now the owners of all the lands hereinabove described and set out by reason of their said purchase from the said Charles P. Chouteau as aforesaid. But so it is, may it please your honor, that after the subscription as aforesaid by the county of Butler to the cap-
23 ital stock of the Cairo & Fulton R. R. Company, and after the certificate made by order of the county court of said county of Butler to the State register of lands as aforesaid, and after the governor, in pursuance to law and of the action of the said county court of Butler county, had issued the patent to the said Cairo & Fulton Railroad Company conveying said land to said R. R. company, and after the said R. R. company had issued its bonds for $1,000,000 and made, executed, and delivered its said deed of trust on all the lands aforesaid to secure the said bonds of the county of Butler, not regarding its said actions and the proceedings of its said county court, not regarding the rights of the said railroad company and its grantees, and contrary to equity and justice, on, to wit, November 7, 1866, filed in the circuit court of said Butler county its petition against the Cairo & Fulton R. R. Company and the said John Moore, John Wilson, and A. G. Waterman, trustee- as aforesaid, for the purpose of cancelling and setting aside the said patent from the State of Missouri to the Cairo & Fulton Railroad Company and the deed of trust from said R. R. company to Moore, Wilson, and Waterman, trustees as aforesaid; that in said proceeding service was attempted to be had by publication, the plaintiffs in said cause alleging that the said Moore, Waterman, and Wilson were non-residents of the State of Missouri; that in the said proceeding the said Cairo & Fulton R. R. Company were brought in, as was pretended, by personal service, but your complainants herein here aver, charge, and show the fact to be that the service in said cause, the pretended appearance of the defendants by their attorney and in their own proper persons, was, in fact, a fraud and deception imposed upon the circuit court trying said cause; that in truth and in fact the said Waterman, previous to the bringing of said action in said circuit court, and said Moore, soon after the bringing of said action and before service upon him therein had been obtained, had departed this life, and their successors in said trust and as trustees had been appointed in pursuance to the provisions of
24 the said deed of trust; that in consequence of their said deaths and the appointment of their successors as such trustees, as aforesaid, no service was had in said cause, the new trustees were not made parties, were not served with process and had no notice of proceedings, although necessary and proper parties. The other defendants in said cause, viz., the said Cairo & Fulton R. R. Com-

pany, was not a necessary or proper party, as by the foreclosure of the State lien on said railroad under what is known as the sell-out act and the purchase of said railroad under said sale the said company before the commencement of said suit was dissolved and had ceased to exist and could not legally be made a party to said proceedings; that the only party defendant to said proceedings that was in fact present or pretending to make a defense in said action was Green L. Poplin, who had at one time been the president of the said railroad company, but long previous to the bringing of said suit had ceased to be connected with the said Cairo & Fulton R. R. Company in any capacity whatever, but was in fact acting in collusion with the attorneys and agents of said Butler county to aid said Butler county and its attorneys to avoid and disregard their said contract with the Cairo & Fulton R. R. Company.

And these complainants aver and charge the fact to be that notwithstanding the fact that the said circuit court proceeded to find the issues in said case for the said county of Butler and to decree that the said deed from the State of Missouri to the Cairo & Fulton R. R. Co. and the deed of trust from said railroad company to the said Moore, Waterman, and Wilson be canceled, set aside, and for naught held, and that the interest of the defendants therein be divested out of them and invested in said county of Butler, that all said pretended proceedings were null, void, and of no effect whatever on account of the collusion of the parties thereto and because the parties holding the title under said deed of trust in trust for
25 the holders of the bonds of the said Cairo & Fulton R. R. Company were not parties to said suit and did not appear thereto, either in person or by attorneys.

And because neither the said bondholders nor their assigns were in court by service of process or otherwise.

That subsequently, to wit, at the April term, A. D. 1872, of the Mississippi county circuit court, proceedings were commenced by Charles P. Chouteau, who had become the owner of the greater part of the said Cairo & Fulton R. R. bonds, against the Cairo & Fulton R. R. Co., Thomas Allen, Henry H. Bedford, John Wilson, Mason Brayman, Wm. H. Bailhache, Henry J. Deal, James H. Bethune, E. W. Hill, George Whitcomb, Joseph C. Moore, James M. Patterson, Greene L. Poplin, Samuel Montgomery, James G. Nalle, Rudolph E. W. Weber, T. W. Johnson, James Clarkson, and Henry Seelys, defendants, to foreclose said deed of trust.

That said deed of trust was subsequently to the pretended decree in favor of Butler county foreclosed by judgment of the supreme court of the State of Missouri, and the lands herein described among others were ordered sold to satisfy the said debt of the Cairo & Fulton R. R. Company, and under that decree the lands herein described and all other lands conveyed by said deed of trust were sold and were purchased by the said Charles P. Chouteau, and by said Chouteau sold to your complainant, The F. G. Oxley Stave Company, and conveyed to Frederick G. Oxley, trustee for it; that the amount of said judgment of said supreme court to be satisfied out of the proceeds of the sale of said lands was $518,005.60, and that

at said foreclosure sale all the lands described in said deed of trust were sold to satisfy said judgment, and that at said sale they brought only $368,838.14, leaving a large balance of said judgment unsatisfied; that in the year, to wit, A. D. 1863, a number of judgments were obtained in the circuit courts of Mississippi county, in the State of Missouri, against the said Cairo & Fulton R. R. Com-
26 pany, and on the 26th day of July, 1867, an execution was issued on said judgment against said company, and was levied on a part of the land in this petition described, and on the 25th, 26th, and 27th days of September, A. D. 1867, all the lands so levied on were sold by the sheriff of Butler county to different parties, many of whom have since that conveyed the same to others; that said lands so sold are now claimed by the several parties hereinafter named in connection with the description—that is to say:

(Here follows the description of the land, which by consent is omitted.)

All claimed by the devisees under the will of Thomas Allen, now deceased, hereinafter made defendants under and by virtue of said sheriff's sales; that the east ½ of sec. 9, twp. 22 N., rng. & E., and all of sec. 10, twp. 22 N., rng. 7 E., are claimed by one C. P. Heinrichs, who is made defendant herein under and by virtue of said sheriff's sale.

That all of sec. 27, in twp. 22, rng. 7 E., was claimed by Benjamin R. Moore, now deceased, and whose heirs are unknown to these complainants; that the E. ½ of sec. 22, twp. 22, rng. 7 E., is claimed by Evan B. Day, who is made party defendant hereto under and by virtue of said sheriff's sale; that the W. ½ of sec. 23, twp. 22, rng. 7 E., is claimed by Hattie Spinney, who is made a party defendant under and by virtue of said sheriff's sale, and that one Loring Bartlett, who is also made a defendant hereto, has some claim on said last-described tract as a mortgagee of said Hattie Spinney; that Herman Bader, who is made defendant hereto, claims all of sec. 28, twp. 7 N., rng. 7 E., under said sheriff's sale; that W. ½ of sec. 31, twp. 22 N., rng. 7 E., is claimed by John C. Tunnison and Julia C. Tunnison, his wife, who are defendants hereto. The N. ½ of sec. 33, twp. 22 N., rng. 7 E., is claimed by Jonathan Woodruff, also made a party defendant to this bill under said sheriff's sales. The south-east ¼ of said sec. 33 is claimed by E. K. Pitcher, who is made a party defendant to this bill under said sheriff's sale.
27 The west ½ of said sec. 33 is claimed by E. P. Bates under said sheriff's sale, and all of sec. 34, in twp. 22 N., rng. 7 E., is claimed by Joshua Hill. The said E. P. Bates and Joshua Hill are made party defendants under said sheriff's sale. That in said several suits in the said circuit court the said Cairo & Fulton Railroad Company was the only defendant; neither said trustee or the bondholders were made parties to said suit, neither did they in any way have notice thereof or appear therein by attorney or otherwise, and whatever rights said judgment creditors acquired by reason of their said several judgments and whatever title the said purchaser at said sheriff's sale made under said judgments acquired were subject and subservient to the said first deed and the rights of the bondholders

of said Cairo & Fulton Railroad Company. The purchasers at said foreclosure proceeding under the decree of the supreme court took a paramount and superior title to all said parties and purchasers at said sheriff's sale; that the said sheriff's deeds made to the purchasers at said execution sales conveyed no title to the said purchaser as against the prior lien of the said trustees under said trust deed, and the mesne conveyances from said purchasers to the present claimants above mentioned and set out only operates as a cloud upon the title of your complainant; that Butler county, Missouri, by its county court, long since the sale and transfer to the Cairo & Fulton Railroad Company, since the making of the said deed of trust by said railroad company to secure its said bonds, since the foreclosure of said deed of trust, and since the sale thereunder to the said Charles P. Chouteau, has attempted to sell and convey to George F. Emerson and other — parts of said lands conveyed by the State of Missouri to the Cairo and Fulton R. R. Company and by said railroad company in trust to secure its bonds, the lands hereafter described being part of the lands in the petition first above described, as being purchased under foreclosure
28 sale by Charles P. Chouteau; that said lands so attempted to be sold by the county aforesaid are described as follows:

(Here follows description of land, which by consent is omitted.)

And the said county of Butler, by its deed dated December 10th, 1874, and recorded in Book J of Butler County Deed Records, conveyed or attempted to convey to said St. Louis, Iron Mountain & Southern railway the following-described lands, to wit:

(Here follows description of lands, which by consent is omitted.)

And the said St. Louis, Iron Mountain and Southern Railway Company now claim to own the same by virtue of said deed from said county of Butler, but which said deed was issued wholly without authority of law.

The county of Butler, in the State of Missouri, Thomas Allen, Catherine Dubbs, Bella Mason, George F. Emerson, John M. Hershey, Charles F. Heinrichs, William M. Haymaker, T. J. Van Hardenburg, Stephen M. Chapman, Samuel Lilley, Green L. Poplin, August Brandt, Henry H. Bedford, J. W. G. Weirman, E. E. Kinzer, J. W. Stump, Philo E. Baker, John A. Erbe, Fred. S. Eason, William Packard, Wm. O. Packard, Harrison G. Packard, and Floyd W. Packard, Belzora and Elizabeth B. Ferguson, Keystone Land & Lumber Company, Susan Smith, Alfred Kelley, Melville F. Moore, Catherine S. Hess, Farmin M. Markham, and David W. Blumeyer, Jacob Weidman, Joseph P. Hutton, his wife, John McSperrim and Eliza, his wife; William Morris, Albert H. Fink, trustees of St. Paul church, Ironton, Mo.; A. S. Lee, John W. Forney, W. H. H. Kinzer, John Mengel, Edward Westmeyer, Charles M. Howell, Dennis R. Harder, James J. Johnson, Ira E. Leonard, Wm. Dewey, John W. Hansett, John McSmith, Daniel B. Miller, Henry Miller, Albert Miller, Thomas Tate, William Grindstaff, Benjamin F. Turner, and William A. Spence, James Whittington, Francis Whittington, James F. Tubb, Harvey Hortsman,
29 J. E. Baldwin, Lyman & Edward Gregory, D. S. Asher, Elkin

Pedigo, Isom Keith, Ellen Road, Sarah M. Davidson, St. Francois Lumber Co., H. G. McCormick, George Abbott, T. A. Silver, Martin Ferguson, Isaac M. Davidson, and The St. Louis, Iron Mountain & Southern Railway Co., have deeds now of record attempting to convey to the said parties respectively the several tracts of land above described immediately before their respective names, and the said several parties claim to be owners of said lands respectively, but in truth and in fact the said parties had full notice of the rights and title of the grantors of your complainants and well knew that by their said attempted purchase they in fact acquired no title, but only complicated the records and cast a cloud on the title of your complainants; that the county of Butler pretends to have some claim to the residue of said lands first above in this petition described and acquired by your complainant from Charles P. Chouteau; that since the making of the said several conveyances the said Joseph W. Baldwin has departed this life, leaving Thomas T. Baldwin, James R. Baldwin, and Lucy Baldwin, his children and heirs-at-law. The said Lucy Baldwin has intermarried with Edward J. Hamilton; that the said E. E. Kinzer has died intestate, leaving William Kinzer and Maggie Kinzer, his children and heirs-at-law. The said Maggie Kinzer has intermarried with one A. E. Kingport; that said Thomas Allen has departed this life, leaving a will, in which Ann R. Allen, his widow, and William R. Allen, George W. Allen, Thomas Allen, Bradford Allen, Elizabeth R. Donaldson, Ann L. Allen, and Alice Maud Allen, his children, were devisees; that said Elizabeth R. Donaldson then was and still is the wife of William R. Donaldson; that said Alice Maud Allen has since intermarried with Charles Atwater; that said Bradford Allen has since died, leaving a will, in which Helen G. Allen, his widow, and Ann R. Allen, his child, were the only devisees; that the said D. D. Emmons is now dead, and Marie Blaine, his widow; Nellie Emmons, and Gracie Emmons are his only heirs-at-law.

That the said Benjamin R. Moore, Daniel B. Miller, and Henry Miller have since the making of said deeds died, and their heirs are wholly unknown to these plaintiffs, and upon diligent inquiry they have been unable to learn their names.

That the said Belzora Ferguson has intermarried with William Fleming, and the said Elizabeth B. Ferguson has intermarried with George Adams. Your complainants would here show and state that all the said above-described lands are wild and unoccupied; that your complain-ts have since the said purchase been in the constructive possession, keeping a watch over them and looking after the timber and exercising all the acts of ownership of which said lands are capable; that the said above-mentioned claimants under the several circuit court judgments and under Butler county have not now nor have they at any time had either actual or constructive possession and have exercised no acts of ownership, so far as your complainants are informed and as they believe, and your complainants aver that the title they acquired from said Charles P. Chouteau, as above herein specifically mentioned, is injured by reason of

the several claims herein set out, and the claimant under said several circuit court judgments and the several claimants claiming under the county by conveyances made subsequent to the conveyances by the State of Missouri to the Cairo & Fulton R. R. Co. have in fact no title to any of said lands, but the several conveyances to them create and are a cloud on the title of the petitioners herein and tend to injure their title in and to said lands and to prevent them from selling or disposing of the same freely and for the purpose of their business, as they should be able to do but for the said several conveyances to the defendants herein and for the cloud cast on their title from the fact the said conveyances appear of record on the land record in said county of Butler and is a continued damage and injury to your petitioners and to their said title; all of which actings and doings of the said several defendants are
31 contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of the plaintiffs in the premises.

In tender consideration whereof and forasmuch as the plaintiffs are remediless in the premises at and by the strict rule of the common law and are relievable only in equity, where matters of this nature are properly cognizable and relievable, to the end thereof that the said County of Butler (in the State of Missouri); Ann R. Allen, widow Wm. R. Allen; Thomas Allen, Anne L. Allen, Elizabeth R. Donaldson and William R. Donaldson, her husband; Alice Maud Atwater and Charles Atwater, her husband; Helen G. Allen and Ann R. Allen, Thomas J. Baldwin, Joseph L. Baldwin; Lucy Hamilton, Edward J. Hamilton, her husband; William Kinzer; Maggie Kingport, A. E. Kingport, her husband; Marie Blane, Nellie Emmons, and Gracie Emmons; Bella Mason, D. J. Mason, her husband; Catherine Dubbs, Geo. F. Emerson, John M. Hershey, Chas. F. Heinrichs, William M. Slaymaker, T. J. Van Hardenburg, Stephen M. Chapmen, Samuel Lilly, Greene L. Poplin, August Brandt, Henry H. Bedford, J. W. G. Weirman, J. W. Stump, Philo E. Baker, John A. Erben, Fred. S. Eason, William Packard, William O. Packard, Harrison G. Packard, Belzora Ferguson, and Belzora Fleming and Wm. Fleming, her husband; Elizabeth B. Ferguson, now Elizabeth B. Adams, and George Adams, her husband; Keystone Land & Lumber Co., Susan Smith, Alfred Kelley, Melville F. Moore, Catherine S. Hess, Farmin M. Markham, David W. Blumever, Jacob Weidman; Joseph P. Hutton, Eliza Hutton, his wife; John McSperrin and Eliza, his wife; William Morris; Albert H. Fink, trustee of St. Paul church, of Ironton, Mo; A. S. Lee, John W. Forney, W. H. H. Kinzer, John Mengel, Edward Westmeyer, Chas. M. Howell, Dennis R. Harder, James J. Johnson, Ire E. Leonard, Wm. S. Dewey, John W. Hansett, John McSmith, The Unknown Heirs of Henry Miller, The Unknown Heirs of Daniel Miller, Thomas Tate, William Grindstaff, Benjamin F. Turner, William A. Spence,
32 James Whittington, James F. Tubb, St. Louis, Iron Mountain and Southern R. R. Co., Harvey Hortsman, Lyman Gregory, Edgar Gregory, D. S. Asher, Elkin Pedigo, Isom Keith, Ellen Road, Sarah M. Davidson, St. Francois Lumber Co., H. G.

McCormick, George Abbott, T. A. Slicer, Martin Ferguson, The Unknown Heirs of Benjamin R. Moore, Evan B. Day, Hattie Spinney, Herman Bader, John C. Tunnison, Julia C. Tunnison, Jonathan Woodruff, E. K. Pitcher, E. P. Bates, Joshua Hill, Isaac N. Davidson, and The St. Louis, I. M. & S. R'y Co., who are hereby made defendants to this petition, may full, true, and perfect answers make, and show why the plaintiffs should not have the relief hereby prayed, and may be required to answer the matters and things in this petition set out as fully and perfectly as if they had been thereto required by special interrogatories, and that upon a hearing of the matters and things charged in this petition that the said several conveyances from Butler county, made subsequent to the patent from the State of Missouri to the Cairo & Fulton R. R. Co., be declared by the decree of the honorable court to be canceled and set aside; that the mesne conveyance from said Butler county to the several claimants here-above set out be also canceled, annulled, and set aside, and in all things for naught held.

That the several conveyances from the sheriff of Butler county to the purchasers under the said several circuit court judgments and the mesne conveyances from the said purchasers to the present claimant- here-above made defendants be declared null and void and of no effect and canceled and set aside as clouds on the plaintiffs' title.

That the claimants' title above mentioned, and also the claim of Butler county to any of the lands in this petition described, be declared null and void and of no effect, and that all the said conveyances be declared to be a cloud upon the title of these plaintiffs, and therefore null and void and of no effect whatever, and that the title of the plaintiffs be decreed to be the paramount title to
32 all the said lands in the petition above described, and that plaintiffs have such other and further relief in the premises as to equity and good conscience may seem meet.

The plaintiffs herein further allege and show that the following-named defendants are non-residents of the State of Missouri, so that ordinary process cannot be served upon them, to wit, Ann L. Allen, Helen G. Allen, Alice Maud Atwater, Charles Atwater, Lucy L. Hamilton, Edward J. Hamilton, William Kinzer, Maggie Kingport, A. E. Kingport, Bella Mason, D. J. Mason, Catherine Dubbs, George F. Emerson, John M. Hershey, William Slaymaker, Samuel Lilly, T. J. Van Hardenburg, Samuel Lilly, Greene L. Poplin, August Brandt, J. W. G. Weirman, J. W. Stump, Philo E. Baker, John A. Erben, William Packard, William O. Packard, Harrison G. Packard, Floyd W. Packard, William Fleming, Susan Smith, Melville F. Moore, Catherine S. Hess, Farmin W. Markham, David W. Blameyer, Jacob Weidman, Joseph P. Hutton, John McSperrin, Eliza McSperrin, his wife; William Morris, trustees of St. Paul's Episcopal church; A. S. Lee, John Westermeyer, Charles M. Howell, Dennis R. Harder, James L. Johnson, Ire E. Leonard, William S. Dewey, John W. Hansett, John M. Smith, Lyman Gregory, D. S. Asher, Ellen Road, The Unknown Heirs of Benjamin E. Moore, Deceased; The Unknown Heirs of Henry Miller, Deceased; The Unknown Heirs of Daniel B.

Miller, Deceased; Albert Miller, Evan B. Day, Hattie Spinney, Julia C. Tunnison, Jonathan Woodruff, E. K. Pitcher, E. P. Bates, and Joshua Hill, and that defendants The Keystone Land & Lumber Co. and The St. Francois Lumber Co. are corporations organized under the laws of Pennsylvania and Arkansas respectively.

Plaintiffs therefore pray that an order of publication be made in said cause notifying said defendants of the pendency of said suit as required by law.

JOHNSON & LENTZ,
PAXTON & WARRINGTON,
HITCHCOCK, MADILL & FINKELNBURG,
Att'ys for Plaintiffs.

34 *Separate Answer of St. Louis, Iron Mountain and Southern Railway Company.*

Now comes the defendant The St. Louis, Iron Mountain & Southern Railway Company, a corporation as charged to be in the amended petition herein, and for its separate answer to plaintiffs' said amended petition says:

First. It has no knowledge or information sufficient to form a belief as to whether the plaintiff The F. G. Oxley Stave Company is a corporation as is charged in the bill herein, and hence demands proof thereof. But if it be such corporation this defendant avers that it cannot legally or lawfully acquire, hold, or have any real estate within this State.

Second. This defendant admits that the United States, by an act of its Congress approved September 28, 1850, granted to the State, of Missouri large tracts of land, and admits that amongst the lands so granted were all of the lands mentioned in the plaintiffs' said amended petition.

Third. This defendant denies that the State of Missouri, by an act of its legislature approved February 23, 1853, granted the lands mentioned in plaintiffs' said petition to the county of Butler, in said State; but the defendant admits that the State of Missouri did by its legislature pass an act of the date aforesaid, entitled "An act donating swamp lands in the several counties in which they lie" (Sess. Acts 1853, p. 108), to which reference is hereby made for ascertainment of its scope, effect, and terms; and this defendant further avers that an act of the legislature of the State of Missouri approved March 3d, 1851, entitled "An act donating certain swamp and overflow lands, *entitled "An act donating certain swamp and overflow lands* to the counties in which they lie" (Sess. Acts 1851, p. 238), was by express reference made a part of the aforesaid act of 1853, and this defendant likewise prays reference to said act for the import and terms thereof.

35 Fourth This defendant admits that the legislature of the State of Missouri, by an act entitled "An act to authorize the formation of railroad associations and to regulate the same" (Sess. Acts 1853, p. 121), authorized, upon certain terms and conditions therein named, the county courts in this State to subscribe for the

stock of any railway company organized under any law of this State, but not otherwise; but this defendant denies that any such county was authorized to use any of its swamp or overflow lands in payment for any subscription so made, but avers that it could not otherwise use any such lands for said purpose to sell or mortgage the same.

Fifth. This defendant denies that the Cairo & Fulton R. R. Company was organized under the act last aforesaid.

Sixth. This defendant admits the legislature of the State of Missouri passed an act entitled "An act to enable certain counties to transfer swamp, wet, and overflowed lands to the Iron Mountain or Cairo & Fulton Railroad Company," approved December 7th, 1855 (Local Acts 1855, p. 353), but this defendant denies that Butler county ever transferred any of its swamp lands to said Cairo & Fulton Railroad Company under the said act. This defendant prays reference to said act for the terms and meaning thereof.

Seventh. This defendant admits that the legislature of the State of Missouri passed an act of the date of December 10th, 1853, entitled "An act to secure the completion of certain railroads in this State" (Acts 1855, p. 472) of the import alleged in plaintiffs' said petition, but prays reference thereto for contents and construction thereof.

Eighth. This defendant denies that the county of Butler subscribed for fifty thousand dollars of the capital stock of the Cairo & Fulton railroad, either on the 24th day of October, 1854, or at any other time, and denies that at said date and for said alleged
36 subscription the county court of said county provided that the same should be paid out of the swamp lands of said county, and denies that said county court had any authority so to do or that said county at said time had any title to said class of lands, and denies that on the 6th day of December, 1855, or at any other time the county court of Butler county directed or decreed that its swamp lands be transferred or conveyed to said Cairo & Fulton railroad in payment of said alleged subscription at any price whatsoever, or that it had power or authority so to do, and denies that as said time or any other time appointed Daniel L. Jennings to make any deeds as alleged in said petition; and this defendant avers that said Jennings never made any deeds pursuant to said pretended or alleged order or otherwise.

Ninth. This defendant denies that on the 6th day of December, 1855, or at any other time the county court of Butler county subscribed for an additional fifty thousand dollars of the capital stock of the Cairo & Fulton R. R. Company, and denies that it ordered alternate sections of its swamp lands to be set over, sold, or transferred to pay said alleged subscription.

Tenth. This defendant denies that the county court of Butler county on the 19th day of December, 1856, ordered or directed its clerk to certify to the State register of lands at Jefferson City that payment had been made for any lands purporting to have been selected by the Cairo & Fulton R. R. Company, and denies that any

such payment had been made or that any such certificate was made by said clerk.

Eleventh. This defendant denies that any patent was ever issued by the State of Missouri to the Cairo & Fulton R. R. Co. conveying to it any of the lands mentioned in plaintiffs' petition.

Twelfth. This defendant says that it has no knowledge or information sufficient to form a belief as to whether the Cairo & Ful-
37 ton R. R. Company on the 23d day of May, 1857, conveyed all the lands mentioned in plaintiffs' petition to John Moore, John Wilson, and A. G. Waterman, in trust to secure the payment of the bonds of said railroad, and hence demands proof thereof; and this defendant further says that it has no knowledge or information sufficient to form a belief whether Chas. P. Chouteau, on the 16th day of December, 1871, was the owner of any of said alleged bonds of said Cairo & Fulton Railroad Company secured by said alleged deed of trust, and hence demands proof thereof. This defendant admits that the said Chas. P. Chouteau did file in the circuit court of Mississippi county, in the State of Missouri, a petition to foreclose an alleged deed of trust as aforesaid to satisfy a sum alleged to be due upon said alleged bonds; and this defendant further admits that a pretended judgment was rendered upon said petition against the said Cairo & Fulton R. R. Company by the supreme court of the State of Missouri, and that a sale was made under said pretended decree of foreclosure, whereat the said Chas. P. Chouteau became the purchaser under said judgment of the lands mentioned in plaintiffs' said petition; but this defendant avers that neither the said court of Mississippi county nor the supreme court of the State of Missouri had any jurisdiction to render or enter said pretended judgment, for that no part of the lands were situated in the county of Mississippi, whereat said suit was so instituted.

Thirteenth. This defendant says that it has no knowledge or information thereof sufficient to form a belief where, on the 19th day of November, 1886, Chas. P. Chouteau sold the lands described in plaintiffs' petition to the F. G. Oxley Stave Co., or where the said Chas. P. Chouteau conveyed the same to Frederick G. Oxley, as trustee, and hence demands proof thereof.

Fourteenth. This defendant denies that the F. G. Oxley Stave Company was at the time of the institution of this suit or is now the owner of the lands described in plaintiffs' petition herein.

Fifteenth. This defendant admits that the county of Butler,
38 on the 7th day of November, 1866, filed in the circuit court of Butler county, Missouri, its petition against the Cairo & Fulton Railroad Company, John Moore, John Wilson, and A. G. Waterman, who claimed to be trustees in the alleged deed of trust hereinbefore mentioned, and that the object of said petition was to obtain a decree canceling and setting aside *of* pretended patent from the State of Missouri to the Cairo & Fulton Railroad Company and the pretended deed of trust from said railroad company to Moore, Wilson, & Waterman, as trustees, and defendant avers that due service and process required by law was had and obtained upon

said trustees and said Cairo & Fulton Railroad Company, and the decree duly and regularly entered upon said petition in said suit setting aside and canceling said pretended patent and said pretended deed of trust, and this defendant now avers that said decree is in full force and effect, binding upon the said named defendants and all parties claiming under, through, or by them and the said pretended conveyances, and this defendant denies each and every allegation of said petition whereby and wherein it is sought to challenge the regularity, efficacy, and binding force of the said decree so entered in the said suit, and this defendant avers that more than twenty (20) years has elapsed since the rendering and entering of said decree and the institution of this said suit, and that said decree cannot now, by reason of the lapse of time, be in any way challenged or impeached.

Sixteenth. This defendant, further answering, denies each and every allegation in said petition and hereinbefore admitted to be true, traversed, or denied.

Seventeenth. And this defendant, further answering and by way of cross-bill, avers that it is now and has been since the — day of July, 1870, the true and lawful owner of all the following-described lands mentioned in plaintiffs' petition, and has been and is now in possession thereof, to wit:

(Description of land omitted by consent.)

Eighteenth. And this defendant further avers, so being in
39 the possession of said land and the owner thereof since the — day of July, 1870, the plaintiff The F. G. Oxley Stave Company and the plaintiff F. G. Oxley, by and through themselves, their servants, agents, and employés, have at divers and sundry times entered unlawfully upon said land and cut a large quantity of timber therefrom of great value; that this defendant is unable to state the value of the timber or the quantity cut therefrom as aforesaid by the plaintiffs.

Nineteenth. This defendant further states that the said plaintiffs are threatening and are now proceeding to so unlawfully cut the timber from off said land and further despoil the same, and so commit divers and sundry trespasses thereupon, and that the said trespasses and depredations upon said lands by said plaintiffs, this defendant is informed, are being done by virtue of an alleged title in and to said lands, as set forth in plaintiffs' petition herein. Wherefore this defendant prays that the said plaintiffs be enjoined perpetually from committing further trespasses upon said lands by themselves, through or by their servants, agents, or employés; that a master or referee be appointed to take and state an account between this defendant and the said plaintiffs, setting forth the value of the timber so cut and removed from said land and the injury done thereto by the said unlawful acts of the plaintiffs, and that defendant have judgment against said plaintiffs for the value of said timber and the damage done to said land, and that a decree be herein entered against said plaintiff adjudging them to be without title in and to the said lands so herein averred as belonging to this defendant, and that this defendant's title in and to said land be

affirmed and decreed, and for such other and further relief as to this court may seem meet and proper in the premises.

Answer of St. Francis Lumber Company.

The said defendant, St. Francis Lumber Company, by leave
40 of court first had and obtained, files its answer herein and denies each and every allegation of the petition of the plaintiff-, except that this defendant claims and has title to the several tracts and parcels of land concerning which the plaintiff- seeks relief against this defendant.

Defendant further says that for three years last past it has been and still is in open, notorious, continuous, and adverse possession of said land, claiming under its deeds of record.

And, having fully answered, said defendant prays to be hence dismissed with its costs.

Butler County and sundry other defendants answer, denying generally the allegations in plaintiffs' bill.

To the new matter contained in the answers plaintiffs file their replication denying the same.

The attorneys for respondents hereby consent that in making out the abstract of record in said case provided for by rule eleven of the supreme court of Missouri appellants may refer to the several acts of Congress and the acts of the legislature of Missouri offered in evidence, by volume and page, without inserting said acts or any of them in such abstract.

LIONBERGER & SHEPLEY,
Attorneys for Respondent-.

On the trial of the case the following testimony was offered:

Plaintiffs offered in evidence act of Congress of September 28, 1850, 9th U. S. Statutes at Large, p. 519.

Plaintiffs also offered in evidence an act of the legislature of the State of Missouri approved March 3d, 1851, entitled "An act donating certain swamp and overflowed land to counties in which they lie," as found in Session Acts of 1850–'51, p. 238.

41 Plaintiffs further offered in evidence an act of the legislature of the State of Missouri approved February 23, 1853, and found in Session Acts for 1852–'3, p. 108, entitled "An act donating swamp and overflowed lands to the several counties in which they lie."

Plaintiffs offered in evidence an act of the legislature of Missouri approved February 24, 1853, entitled "An act to authorize the formation of railroad associations and regulating the same," from Session Act- 1852–'3, page 121, calling attention and reading sections 28, 29, 30, and 32.

Plaintiffs further offered in evidence an act of the legislature of the State of Missouri approved December 7, 1855, and found in Session Acts of 1855, p. 353, entitled "An act to enable certain coun-

ties to transfer swamp, wet, and overflowed lands to the Iron Mountain & Fulton R. R. Co."

To the introduction of which defendants' counsel objected for the reason that it is incompetent and irrelevant, but the court overruled defendants' objection, and defendants excepted.

Plaintiffs also offered in evidence an act of the legislature of Missouri approved December 10, 1855, found in Session Acts for 1855–'56, p. 472, entitled "An act to secure the completion of certain railroads in this State."

Plaintiffs offered in evidence an act of the legislature in Missouri approved March 1, 1855, entitled "An act to ordain and establish a district county court." Session Acts 1854–'55, p. 475.

Plaintiffs also offered in evidence two patents of the United States to the State of Missouri, conveying the lands in controversy, dated August 22, 1856. Plaintiffs then offered in evidence copies of the articles of association of the Cairo & Fulton R. R. Company, which are as follows:

Articles of Association of the Cairo and Fulton Railroad Company.

In conformity with the act of the General Assembly of the
42 State of Missouri entitled "An act to authorize the formation of railroad associations and to regulate the same," approved the twenty-fourth day of February, in the year eighteen hundred and fifty-three, the undersigned have associated for the purpose of constructing, maintaining, operating, and owning a railroad for public use in the conveyance of persons and property, as set forth in the following articles:

1st. The name of said corporation shall be the Cairo and Fulton Railroad Company.

2nd. The same shall continue five hundred years from the date of this incorporation.

3rd. The amount of capital stock of said company, including the cost of construction, the road, the right of way, motive power, and other appurtenances for the completion and running of said road as near as can be estimated, will be one million five hundred thousand dollars, making sixty thousand shares at twenty-five dollars each share.

4th. There shall be thirteen directors to manage the affairs of this company, as follows: Orson Bartlett, Bloomfield, in the county of Stoddard, in the State of Missouri; Henry Miller, Bloomfield, in the county of Stoddard, in the State of Missouri; John M. Johnson, Bloomfield, in the State of Missouri; John D. Smith, Bloomfield, in the county of Stoddard, in the State of Missouri; James Nations, Bloomfield, in the county of Stoddard, in the State of Missouri; William A. Whitehead, of Castor township, in the county of Stoddard, in the State of Missouri; Daniel Kitchen, of Bloomfield, in the county of Stoddard, in the State of Missouri; Samuel H. Flournoy, of Bloomfield, in the county of Stoddard, in the State of Missouri; John Beasly, of Castor township, in the county of Stoddard, in the State of Missouri; James E. Rhodes, of the township of Pike, in the county

of Stoddard, in the State of Missouri; Noah W. Sitz, of the township of Pike, in the county of Stoddard, in the State of Mis-
43 souri; Hiram A. Shook, of the township of Pike, in the county of Stoddard, in the State of Missouri; James Wells, of the township of Castor, in the State of Missouri and county of Stoddard.

5th. The road to commence at a point on the Mississippi river opposite the mouth of the Ohio river in the State of Missouri, taking its course through the counties of *the* Mississippi, Scott, Stoddard, and Butler, as near as can be ascertained, to connect with the Cairo & Fulton railroad on its northern end, and incorporated by the State of Arkansas on the twelfth day of January, A. D. 1853, and to terminate on or near the line which divides the States of Missouri and Arkansas at a point the most eligible, the length of said road being eighty-five miles or thereabouts.

6th. The directors of this company are authorized to make any contract or agreement in writing with any other railroad company in this or any other State in reference to their affairs that may best insure the early construction of said railroad and its successful management, and also to make joint stock with any other railroad company and to form one board of directors for the management of their affairs. The contract or agreement of their respective boards shall form a part of these articles of association whenever the same may be entered into and be recorded therewith.

7th. These articles of association may be altered or amended by a vote of the owners of two-thirds of the capital stock subscribed.

In witness whereof we have hereunto affixed our seals and signed our names, places of residences, and the number of shares of stock each of us agree to take this 12th day of September, A. D. 1853.

Orson Bartlett, Bloomfield, Stoddard county, Missouri, agrees to take forty shares, amounting to $1,000. (Seal.)

44 Henry Miller, Bloomfield, Stoddard county, in the State of Missouri, agrees to take forty shares. (Seal.)

John M. Johnson, Bloomfield, State of Missouri, agrees to take fifty shares. (Seal.)

John D. Smith, Bloomfield, county of Stoddard, State of Missouri, agrees to take ten shares. (Seal.)

James Nations, Bloomfield, Stoddard county, Missouri, agrees to take twenty shares. (Seal.)

William A. Whitehead, Castor township, Stoddard county, in the State of Missouri, agrees to take ten shares. (Seal.)

Daniel Kitchen, Bloomfield, Stoddard county, in the State of Missouri, agrees to take ten shares. (Seal.)

S. H. Flournoy, Bloomfield, Stoddard county, in the State of Missouri, agrees to take fifteen shares. (Seal.)

John Beasley, Stoddard county, in the State of Missouri, agrees to take four shares. (Seal.)

James E. Rhodes, Pike township, Stoddard county, in the State of Missouri, agrees to take ten shares. (Seal.)

Noah W. Sitz, Pike township, Stoddard county, State of Missouri, agrees to take four shares. (Seal.)

Hiram A. Shook, Pike township, Stoddard county, State of Missouri, agrees to take eight shares. (Seal.)

James Wells, Castor township, Stoddard county, in the State of Missouri, agrees to take one share. (Seal.)

We, Hiram A. Shook, W. D. Taylor, and Noah W. Sitz, acting and duly commissioned justices of the county court within and for the county of Stoddard, in the State of Missouri, empowered by law to act for the said county of Stoddard and by virtue of the powers vested in us by law as aforesaid, being actuated, induced, and required by the citizens of said county as evidenced by their unanimous vote at the polls, do on behalf of said county of Stoddard subscribe and agree to take four thousand shares in Cairo & Fulton Railroad Company.

45 In testimony whereof we have hereunto signed our names this 22d day of November, 1853.

HIRAM A. SHOOK, *President;*
WILLIAM D. TAYLOR,
NOAH W. SITZ,
Justices of the County Court of Stoddard County.

William G. Phylan, Stoddard county, Missouri, ten shares.

Stoddard County Court, Transacting County Business, October Term, A. D. 1853, December 6th, A. D. 1853, 3d Day of the Term.

Ordered by the court that this county subscribe four thousand shares, amounting to one hundred thousand dollars, of the funds arising from the sale of swamp lands belonging to this county to the Cairo & Fulton railroad.

I, Reuben P. Owen, clerk of the county court within and for the county of Stoddard, in the State of Missouri, do certify the foregoing to be a true copy of the order of said county court as the same appears of record now remaining in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the town of Bloomfield, county and State aforesaid, this 28th day of December, A. D. 1853.

[SEAL.] REUBEN P. OWEN, *Clerk.*

STATE OF MISSOURI, }
County of Stoddard. }

This day personally appeared before me, the undersigned, clerk of the county court for the county of Stoddard, in the State of Missouri, John M. Johnson, John D. Smith, and James Nations, all of whom are directors of the Cairo & Fulton Railroad Company in the State of Missouri, who, after being by me duly sworn, states upon oath that at least one thousand dollars of stock for every mile of railroad proposed to be made by said company is subscribed thereto and five per cent. thereon in good faith and in cash to the directors

named in the articles of association of said company, and that
46 it is intended in good faith to construct, maintain, and operate the road mentioned in such articles of association.

JOHN M. JOHNSON.
J. D. SMITH.
JAMES NATIONS.

Sworn to and subscribed before me this 30th day of December, A. D. 1853.

Witness my hand and seal of said court, at office, in the town of Bloomfield, county and State aforesaid, the date above written.

[SEAL.] REUBEN P. OWEN, *Clerk.*

Filed January 12th, 1854.

JOHN M. RICHARDSON,
Secretary of State.

To which defendant objected because the same is irrelevant.

Plaintiffs offered in evidence an act of the legislature of the State of Missouri approved February 20, 1855, Session Acts 1854-'55, p. 314, entitled "An act to confirm the incorporation of the Cairo and Fulton R. R. in Missouri and to apply the grant of lands," etc.

Plaintiffs also offered in evidence certified copy of the order of Butler county court made July 24, 1854, as follows:

STATE OF MISSOURI, } *ss:*
County of Butler, }

In the county court of said county on the 24th day of July, 1855, the following, among other, proceedings were had, to wit;

Ordered by the court that the clerk open (columns) *colms* on the poll books for the purpose of taking the vote of the people for and against the county taking stock in the railroad.

To which defendants objected for the reason that under the
47 statute the county court had no authority to have such poll opened, the law requiring they should first take a vote of the people of the county.

Plaintiffs offered in evidence certified copy of an order of the Butler county court dated October 24th, 1854, which is as follows:

STATE OF MISSOURI, } *ss:*
County of Butler, }

In the county court of said county, on the 24th day of October, the following, among other, proceedings were had, to wit:

It appearing to the satisfaction of the court that qualified voters of said county are in favor of subscribing $50,000 to the Cairo & Fulton R. R.:

Therefore it is ordered by the court that the said sum of $50,000 be subscribed to the Cairo & Fulton R. R. It is therefore ordered by the court that the aforesaid amount of stock be subscribed, payable out of the proceedings of the sales of the swamp land; and it

is ordered that Daniel L. Jennings be appointed agent to subscribe said stock and attend to the interest of said county in said railroad company, and that a warrant be drawn upon the treasurer of this county in favor of the president of said railroad company for $2,500, payable out of the swamp-land fund, to pay the five per cent. upon the amount of stock subscribed; whereupon it is ordered the court do now adjourn until tomorrow morning, 9 o'clock.

Defendants object to the introduction of said order on the ground that no election had been held and the county court had no power to subscribe until authorized by vote of the people, and because the order has no relation to the conveyance of the title claimed by the plaintiffs, but is a subscription in dollars and cents to the
48 capital stock of the railway company and is not a *a* subscription of any swamp lands; but the court overruled defendants' objection, and defendants excepted.

Plaintiff- offered in evidence order of the district county court of Butler county made December 6, 1855, as follows:

STATE OF MISSOURI, } *ss*:
County of Butler, }

December Term, 1855.

In the district county court of said county on the 6th day of December, 1855, the following, among other, proceedings were had, to wit: On motion and upon a satisfactory showing that the citizens of this county are in favor of the same, it is now here ordered and directed by the district county court of Butler that the sum of $50,000 be subscribed to the capital stock of the Cairo & Fulton Railroad Company of the State of Missouri by said county, through Daniel L. Jennings, who is hereby appointed agent for that purpose; that the alternate sections of swamp and overflowed lands belonging to and owned by said county of Butler be sold and transferred, conveyed and set over, by deed or deeds in due form of law, at $1 per acre to meet and fully pay off said subscription upon the execution by said company of a receipt or certificate therefor in due form, through its duly authorized agent, as in other cases of stock subscription when payment is made at the time of subscribing.

It is also ordered that said Daniel L. Jennings be, and is hereby, duly appointed to act as agent in voting upon said stock for and on the part of said county and for such other purposes appertaining to the same as may be necessary and proper.

It is further ordered that the clerk of this court furnish the Cairo & Fulton R. R. with a copy of the foregoing order, duly authenticated with the seal of this court.

Defendants object to the introduction of said order on the ground that it is not averred in the petition that such order was not made by the district court, but by the county court, and that, while
49 said order appears to have been entered in the district court, it is authenticated by the clerk of the county court, and be-

cause the district county court had no jurisdiction to make said order, and because it appears that the order was on the 6th of December, pursuant to a private statute not passed until the 7th of December, and which under the law did not take effect until ninety days thereafter.

But the court overruled defendants' objection, and defendants excepted to the action of the court in so doing.

Plaintiffs then offered in evidence a certified copy of an order of the Butler district county court dated Dec. 6, 1855, and made subsequent to the order on the same date by the same court as follows:

STATE OF MISSOURI, } ss:
County of Butler, }

December Term, 1855.

In the district county court on the 6th day of December, 1855, the following, among other, proceedings were had, to wit:

Whereas the county of Butler has heretofore, under an order of the county court of said county, subscribed to the capital stock of the Cairo & Fulton Railroad Company of the State of Missouri $50,000, and paid a portion thereof as required by charter and regulations of said company;

And whereas said company, as it is understood, is willing to receive in payment of said subscription swamp and overflowed lands owned by the said county of Butler at the price of $1.00 per acre along and near the line of said road as surveyed or which may be surveyed under the direction and authority of said company:

Therefore it is ordered, directed, and decreed by said court that the said swamp and overflowed lands when selected by said company be sold, transferred, and conveyed to said company on the terms above stated—that is to say, $1 per acre—and Daniel L. Jennings, of said county of Butler, be, and hereby is, appointed to execute deed or deeds to said company in due and legal
50 form, invest- the title to said lands in said company upon receiving from said company a proper survey to said county for stock therefor at the rate above stated, in accordance with the charter and regulations of said company.

It is further ordered by said district county court that the said Daniel L. Jennings be, and is hereby, appointed and empowered as agent for the said county of Butler to represent said county in voting upon its stock in the Cairo & Fulton R. R. Co., and for all other legitimate and proper purposes pertaining thereto.

And it is further ordered that the Cairo & Fulton R. R. Company be furnished with certified copy of the foregoing order under the seal of this court.

Defendants object to the above order on the ground that the district county court had no jurisdiction of the subject-matter, and such order is therefore irrelevant. The objection being overruled, defendants excepted.

Plaintiffs' counsel then offered in evidence a certified copy of the order of the district county court of Butler county of March 5, 1856, which is as follows:

Now, at this time, comes Henry H. Bedford and Solomon G. Kitchen, agents of the Cairo & Fulton R. R. Company, and present to this court their report of the selection of the swamp and overflowed lands agreed by said county to be transferred to said company when selected by or under authority of said company in full payment of the stock subscriptions of this company to the capital stock of the Cairo & Fulton R. R. Company of the State of Missouri, which said report shows each division and subdivision of land selected, amounting in the aggregate to one hundred thousand and nineteen acres and $\frac{94}{100}$ of an acre; which said report was by the court proved and confirmed and filed in the office of the clerk of this court.

And it is further ordered that Daniel L. Jennings, who has heretofore been appointed an agent for this county herein, pro-
51 ceed to make, execute, and acknowledge a deed or deeds for and in behalf of the county of Butler, in the State of Missouri, to the president and directors and to their successors in office of the Cairo & Fulton R. R. in Missouri, to all of the lands mentioned in the report of said above-named agents.

And it is further ordered that the clerk of this court place said lands upon his list of entered lands and make a mark of designation upon each subdivision of said land plat now on file in his office by making a cross with red ink upon the same.

Defendants object because the district court had no jurisdiction of the subject-matter, no authority to make the order, and they except to the action of the court in overruling their objection.

Plaintiffs then offered in evidence certified copy of an order of the district county court of Butler county granting certain lands in conformity with the order just read, dated December 9, 1856, as follows:

STATE OF MISSOURI, } ss:
County of Butler, }

December Term, 1856.

In the district court of said county, on the 9th day of December, 1856, the following, among other, proceedings were had, to wit:

Ordered by the district county court within and for the county of Butler and State of Missouri that the clerk of this court certify to the register of lands at the city of Jefferson, of this State, that full payment has been made by the Cairo & Fulton R. R. Company of Missouri for all lands selected in this county by said company under an order of this court heretofore made, subscribing stock to the capital stock of said company and paying said stock by a transfer of swamp and overflowed lands of this county to said company in
full payment thereof; which said list has been selected and
52 approved by this court and is now on file in this office, containing the aggregate of 100,119.94 acres.

The following is a true list and description of said lands so selected by said company as aforesaid:

(Description of lands omitted by consent, it being admitted that the lands in controversy are described in said order.)

The same objection made to the previous order was made to this, and the action of the court in admitting it excepted to.

Plaintiffs offered in evidence certified copy of an order of the Butler county district court, December term, 1855, from the office of the register of lands in the State of Missouri (see page —); to the introduction of which the St. Louis, Iron Mountain & Southern Railway Company and Butler County objected on the ground that it had not appeared when it was filed in the office of the register of lands, because there was no authority to make such a copy, and it did not show when it was filed with such register.

Plaintiffs then offered in evidence certified copy from the office of the register of lands—a copy of the order of the Butler county district court dated Dec. 9, 1856, with certificate of the register dated December 17, 1890; to which defendants' counsel objected because the certificate of the register does not show when such orders were filed in that office. (See page —, Abstract.)

The objections in each case were overruled, and defendants excepted.

Plaintiffs offered in evidence a certified copy of the patent of the governor of the State of Missouri to the Cairo & Fulton R. R. Company, conveying the land in controversy to said railroad, dated April 20, 1857.

The deed recites that it is made pursuant to the act of Dec. 7, 1855. (Copy of deed omitted by consent.)

Defendants object to the introduction of said patent because, while the deed purports to be made pursuant to the act of Dec. 7, 1855, it appears from the evidence introduced that the subscriptions
53 by the county were made on the day before the act of December 7, 1855, went into effect, and because said deed is irrelevant and does not tend to establish plaintiffs' title, and because the statute offered in evidence provides for the filing of an acceptance six months after its passage, and it does not appear that such acceptance was filed with the secretary of state.

Plaintiff then offered in evidence the original deed of trust made by the Cairo & Fulton R. R. Co., of date May 23, 1857, whereby the Cairo & Fulton R. R. Company conveyed to Allen G. Waterman, John Moore, and John Wilson the land therein described, which embraces the land involved in this controversy, for the purpose of securing its 1,600 bonds of $1,000 each, which deed was recorded in Butler county December 13, 1859, and calls attention to sec. 8, which is as follows:

(It is agreed that the balance of this trust deed may be omitted.)

After reciting the purpose for which the deed was made, it grants, bargains, and sell-, etc., unto John Moore and John Wilson, of Illinois, and *Albert* G. Waterman, of Pennsylvania, trustee, and unto the survivor and survivors, successor and successsors, of them

forever all and singular the lands and real estate therein described.

The eight- clause of the deed is as follows:

That for the purpose of continuing and securing the due execution of the trusts hereby created, it is declared that all vacancies that may occur in the office of trustee, by death, resignation, or otherwise, shall be fil-ed thus: The first vacancy shall be filled by a majority of the members of the board of trustees as constituted being in office at the time such vacancy shall take place. The next vacancy shall be filled by the said parties of the first part, and so on alternately until the end, and trustees so appointed shall fill the term and succeed to and perform all the duties and have all the powers hereby conferred upon members of the board of
54 trustees herein named or provided for. They shall constitute and appoint of their own number or otherwise a president of their board of trustees, who shall be a member thereof and who shall hold his office for such time and have and exercise such powers and duties as they may confer and appoint as fully and with like effect as if herein expressed. Such other officers and agents as shall be necessary to the execution of this trust may be appointed in such manner as they may determine, rate of compensation fixed, and such rules and regulations made and carried into effect as they may deem necessary.

Plaintiffs offered in evidence certified copy of record in the case of Charles P. Chouteau against the Cairo & Fulton R. R., Thomas Allen, and others, commenced in 1871, and in the circuit court of Mississippi county, and thereafter appealed to the supreme court, wherein a final decree was entered foreclosing the deed of trust and directing John H. Fisse, as commissioner of the supreme court, to sell the land described in the deed of trust to satisfy the bonds.

Defendants' counsel objected to the introduction of this record on the ground that the defendants herein were not parties to said suit, and because, therefore, said record was incompetent and irrelevant; but the court overruled their objection and defendants excepted.

By agreement all the record in the said cause is omitted except parts of defendant Thos. Allen's amended answer, as follows:

Answer of Thos. Allen.

Thomas Allen, one of the defendants in the above-entitled action, by Kitchen and Thoroughman, his attorneys, by leave of said court, amends his separate answer herein and respectfully states—

That on the 13th day of June, in the year 1861, about six years before said plaintiff acquired any of said pretended bonds mentioned in the petition filed herein, the said Cairo and Fulton Railroad Company of Missouri freely and voluntarily, by their own act and deed, abandoned and surrendered all its franchise and
55 power as a corporation and body politic, and on that day the officers and stockholders of said railroad company, excepting George Whitcomb and the counties of Butler, Scott, and Stoddard, in said State, which said counties and said Whitcomb were then

stockholders in said railroad company, levied war against and became aliens and traitors to and enemies of said State of Missouri and the United States of America.

Whereby said railroad company then and there ceased and became defunct.

All of which said plaintiff well knew before and when *ne* acquired said pretended bonds.

That on the first day of October, in the year 1866, and before said plaintiff acquired any of said pretended bonds, said State of Missouri, as well by law it might, dissolved and extinguished said railroad company, and thereafter, before said plaintiff acquired any of said pretended bonds, said State of Missouri lawfully conveyed to this defendant all the property of said railroad company, including said pretended bonds mentioned in said petition, and also all the other property of said railroad company, of all which bonds and property this defendant is the owner; all of which said plaintiff well knew before and when he acquired said pretended bonds. And this defendant denies that at and prior to the alleged execution of the deed of trust and supplement thereto in said petition mentioned or either of them the said Cairo and Fulton Railroad Company was the owner of the lands *im* said instruments respectively mentioned and described or any of them, save and excepting that part or portion of said lands the title whereto was denied to said corporation under and by virtue of the act of Congress entitled "An act granting the right of way and making a grant of lands to the States of Arkansas and Missouri to aid in the construction of a railroad from a point on the Mississippi opposite the mouth of the Ohio river via Little Rock to the Texas boundary near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi river," approved February 9th, 1853, and the acts and joint resolutions of Congress amending and extending the provisions of said act and the acts of the Legislative Assembly of the State of Missouri accepting and passed in pursuance of the same; and this defendant states that under and by virtue of said conveyances to him, executed by and on behalf of the said counties of Scott and Stoddard respectively, he became and was and now is the owner in fee-simple of the lands in said pretended deed or deeds of trust mentioned and described, situated and lying within said last-mentioned counties respectively, and scheduled, classified, and known as swamp and overflowed lands, and the title whereto is derived under and in pursuance of the act of Congress approved September 28th, 1850, and acts amendatory thereof and the acts of the Legislative Assembly of Missouri passed under and in pursuance thereof; and defendant avers that as against the said title so vested in him as aforesaid each and every order, conveyances, patent, grant, or transfer made or executed by the governor of the State of Missouri or by other officer or person for or on behalf of said State or of said counties or either of them purporting to transfer to or vest in the said Cairo and Fulton Railroad Company of Missouri the title of said counties in and to said lands last mentioned was and is unauthorized, invalid, inoperative, and void and constitutes a

56

cloud upon the title of this defendant derived under said conveyance to him.

This defendant owns, holds, and controls seventeen thousand five hundred and twenty shares of the capital stock of said railroad company, and only about twelve hundred shares of said stock are owned by all persons other than this defendant. This defendant also owns all the interest, capital stock, and property which the said counties of Butler, Dunklin, Scott, and Stoddard ever had into or of said railroad company.

This defendant also owns all the claim, estate, interest,
57 and right which the said Henry J. Deal and James H. Bethune ever had in, to, or against said railroad company or the property thereof; also by virtue of conveyances made by said counties of Butler, Scott, and Stoddard before the commencement of this action this defendant became and is the owner in fee-simple of all the lands described in said petition situated in said counties respectively, the title to which lands was derived from said State of Missouri by said counties.

That in the just and true effect of said conveyance and said ownership consists the interest of this defendant in the property formerly owned by said railroad company. This defendant says that the said railroad company never made nor delivered the instrument described in said petition as a deed of trust, nor did said railroad company ever in any manner incumber or impose any lien upon the lands of said railroad company; that the said railroad company never made nor issued the pretended bonds described in said petition, and that the said pretended deed of trust and bonds are not nor are any of them the act or deed of said railroad company.

The defendant does not know precisely how much money said railroad company expended in constructing its railroad, but he avers that said railroad company did not expend therein more than the sum of two hundred and twenty-five thousand dollars, and he denies that said railroad company completed about forty miles of its railroad. The plaintiff in this action admits that the said railroad company was incorporated on the 5th day of February, A. D. 1853, for the purpose of constructing and operating a railroad seventy-seven and one-half miles in length.

Now this defendant avers that the said railroad company never constructed nor operated said railroad nor accomplished the purpose for which it was incorporated.

58 That more than ten years have elapsed since the said incorporation, and because thereof and because said railroad company did not construct nor operate said railroad within ten years after its said incorporation the corporate existence of said railroad company ceased and determined on the 5th day of February, in the year 1863, and four years before said plaintiff acquired any of said pretended bonds; all which said plaintiff well knew before he acquired any of the pretended bonds.

This defendant denies that said plaintiff has or ever had any right to insert his name or any name in said pretended bonds, as payee

thereof, and this defendant avers that a payee in and of said pretended bonds would be essential to the validity thereof, and the same would be essential even if said pretended bonds had been authorized and partially made by said railroad company.

This defendant respectfully shows that after said defendant became, as aforesaid, the owner of all the property, including said pretended bonds of said railroad company, and long after the dissolution of said company, said plaintiff, for the purpose and with intent to cheat and defraud the stockholders of said company and in order to acquire color or claim of title to the lands described in said petition and which were then the property of said defendant without paying any adequate consideration therefor, at the county of St. Louis, in said State, confederated and conspired with Henry H. Bedford, Mason Brayman, and his son-in-law, one Bailhache, and one Rudolph F. E. W. Weber, and other persons whose names are unknown to this defendant to corruptly, fraudulently, and without the assent of said railroad company or this defendant *to* acquire from said defendant the said five hundred and eighty-one pretended bonds mentioned in said petition; that it was then and there further promised and agreed by and between the said plaintiff and his confederates that he, said plaintiff, for the privilege of becoming and being one of said
59 combination and conspiracy, should and would pay to his said confederates, Brayman and Bedford, the sum of ten thousand dollars in money, which sum of money said plaintiff then and there paid to said Bedford and Brayman, and thereafter, pursuant thereto, the said Bedford, Brayman, Bailhache, Weber, and other persons whose names are unknown to this defendant, without the knowledge or assent of this defendant or the stockholders of said company, took from the possession of this defendant the said five hundred and eighty-one pretended bonds and delivered them to said plaintiff, and, further pursuing the said corrupt and fraudulent agreement, the said Bedford, Brayman, and one John Wilson falsely assumed and pretended to be trustee of and for said railroad company under and by virtue of said pretended deed of trust; and it was then and there further corruptly and fraudulently promised and agreed by and between said plaintiff and the said pretended trustees that if said plaintiff would deliver said 581 pretended bonds to said Brayman, one of said pretended trustees, they, the said pretended trustees, would make and deliver to said plaintiff deeds of conveyance of all said lands described in said petition, whereby said plaintiff should acquire title to said lands.

And thereafter said plaintiff received from said pretended trustees five paper-writings in the form and similitude of deeds of bargain and sale and conveyance of lands of and for all said lands, and said plaintiff then and there delivered to said Brayman the said five hundred and eighty-one pretended bonds, who now holds the same, and said plaintiff now holds the said pretended deeds of conveyance; that the said pretended bonds were so delivered in payment of and for said pretended deeds of conveyance, and said pretended deeds of conveyance were, as aforesaid, received by said

plaintiff in full payment, satisfaction, and redemption of said pretended bonds. Said plaintiff had no right to said pretended
60 bonds, and said trustees had no power or authority to make or deliver said pretended deeds of conveyance. Each party to said fraudulent transaction well knew at the time of doing the same that he gave no consideration for and received that which was without any value; that the wrong and iniquitous conduct of all parties to said combination and conspiracy are equal, and none of said parties can be heard to complain of any other thereof; that the said delivery of said pretended bonds by said plaintiff to said Brayman was a full, free, and final surrender thereof, and thereby said plaintiff fully acquitted and discharged said railroad company and the surviving stockholders thereof of and from and and all obligations expressed in said pretended bonds, or which might have been created if said transaction had been honest and said pretended bonds valid and genuine bonds of said railroad company; that the said five hundred and eighty-one pretended bonds purport to be and are in the form and similitude of blank bonds partially made by said railroad company—that is, said pretended bonds do not contain the name of any payee or person to whom any obligation could be made; but said defendant says that the truth is, by reason of the aforesaid fraud and wrongs, and because said company never issued said pretended bonds, and because the same are and ever have been blank and incomplete, the said pretended bonds are not the bonds of said railroad company.

To the introduction of this defendants object because they were not parties to said suit and because such evidence is irrelevant; but their objection was overruled, and they excepted.

Plaintiffs then offered in evidence the deed of John H. Fisse, commissioner of the supreme court under the decree just offered in evidence, made October 20, 1882, conveying said lands to Charles P. Chouteau.

The defendants objected to the introduction of said deed on the ground of irrelevancy, and excepted to the action of the court in overruling their objection.

61 Plaintiffs then offered in evidence deed of Charles P. Chouteau made November 19, 1886, whereby Charles P. Chouteau conveyed to the F. G. Oxley Stave Company, F. G. Oxley, trustee for the Oxley Stave Co., the lands described in the petition and in controversy here; to which the same objections were made and the same exceptions preserved to the action of the court in admitting said testimony in evidence.

Plaintiffs offered in evidence certified copy or so much as remains on file in the office of the clerk of the circuit court of Butler county in the case of Butler County against The Cairo & Fulton R'y Co., John Moore, John Wilson, and A. G. Waterman, a suit to reinvest Butler county with the title to the lands in controversy; which record is in brief as follows:

An affidavit for publication, order of publication and the publication itself as to non-resident defendants, certain orders continuing

cause, judgments by default against defendants at various times, recitals that demurrers were filed with the following decree:

Decree.

That said order of said court so certifying that full payment had been made to plaintiff by said Cairo & Fulton Railroad Company of Missouri was false in fact and wholly corrupt and fraudulent; that no value had been or was in fact paid by the said Cairo and Fulton Railroad Company to the plaintiff, the said County of Butler, for said lands or any of them; that the said district county court for Butler county made the order subscribing stock and for the transfer of one hundred thousand acres of said land to the said Cairo & Fulton Railroad Company on the sixth day of December, 1856, and without any value or consideration; that the land is not in alternate sections or tracts, but in large bodies and consecutive tracts; that a large part of said land, and so included in the deed by the governor to the Cairo & Fulton Railroad Company,
62 dated 20th day of April, 1857, was never at any time certified to said governor by said district county court or the county court of Butler county as paid for by said Cairo and Fulton Railroad Company of Missouri, and was in fact never paid for nor certified as paid for; that a majority of the voters of Butler county did not, nor did any of them, at any time vote in favor of said county or the county court of said county or the district county court of said county subscribing any stock to the capital stock of the Cairo and Fulton Railroad Company of Missouri or in favor of transferring any of said lands to said railroad company in payment of stock subscription or for any consideration whatever, nor did a majority of the voters of said county of Butler, nor any of them, at any time petition said district county court or county court for said Butler county in favor of subscribing any stock into or of said railroad company or railroad, nor in favor of the said district county court or the county court or either of them entering an order on its records transferring any of said lands to said Cairo and Fulton Railroad Company of Missouri; that in fact a majority of the voters of Butler county did not vote in favor nor petition in favor of said Butler county subscribing any stock in said Cairo and Fulton Railroad Company of Missouri nor in favor of transferring any of said lands to said company, nor was any election held or any petition signed and presented whereby the sense of the voters of said county of Butler was known or expressed either in favor of or against Butler county subscribing stock or transferring said lands to said Cairo & Fulton Railroad Company of Missouri.

That each and all of these several matters and things was well and fully known to the said Cairo and Fulton Railroad Company and to John Moore, John Wilson, and A. G. Waterman, and were so well and fully known to each and every one of the persons interested in said land at the time and before they took the conveyances of said land and at and before the making of the deed, dated 23d day of

May, A. D. 1857, from said Cairo and Fulton Railroad Com-
63 pany of Missouri to said John Moore, John Wilson, and A. G. Waterman, and were fully advised of all the frauds, deceits, irregularities, want of consideration, that no petition had been presented or election held, and of each and every of the said matters and things at and before said times.

Wherefore it is considered and decreed by the court that said deed dated April 20th, 1857, made by the governor of the State of Missouri to the said Cairo and Fulton Railroad Company of Missouri of the lands described in said plaintiff's petition and in this decree before described, and which is recorded in Book "B," on pages 70 to 123, inclusive, of the records of deeds of Butler county, be, and the same is hereby, vacated, annulled, set aside, and held for naught and absolutely of no force or effect, either in law or equity, and the said deed dated May 23, 1887, from the Cairo and Fulton Railroad Company of Missouri to the said John Moore, John Wilson, and A. G. Waterman, and which is recorded in Book "B," on pages 389 to 456, inclusive, of the records of deeds of Butler county, in so far as it affects or relates to the said herein-described lands, be, and the same is hereby, annulled, vacated, set aside, and held for naught and absolutely of no force or effect whatever, either in law or equity, and that all and singular the title, right, interest, and claim which the defendants or either of them (or those claiming through or under them or either of them by any title derived since the 7th day of November, 1866, the day of the recording the notice *lis pendens* herein) had, held, or acquired in and to said land or any part or portion thereof by virtue of any of the orders of court, deeds, or conveyances hereinbefore recited or referred to or by virtue of any of the premises be, and the same is, absolutely vacated and divested, and the fee-simple title to the said land is absolutely vested in the plaintiff, The County of Butler; to have and hold for the uses and purposes expressed in the act of Congress approved September 28th, 1850, granting said land to the State of Missouri.

It is further considered that plaintiff have and recover of
64 and from defendants her proper costs in — about this suit laid out and expended, and that she have execution therefor.

The pleadings do not appear. It does not appear what was averred, what relief was asked, what defenses were made, but it does purport to divest the title of Waterman, Moore, and Wilson under the deed of trust.

Defendants' counsel objected for the reason that a "part of the record is not admissible," and objected to the action of the court in admitting such testimony, and because plaintiff ought to have supplied the record, and because more than twenty years had elapsed since the judgment was rendered, and it could not be impeached.

Plaintiffs read in evidence deposition of J. SPENCER WATERMAN, which is as follows:

"I am 53 years of age and reside at 2925 Girard avenue, in the city of Philadelphia. I am a clerk in the office of the Pennsylvania

Railroad Company. I am a son of Albert G. Waterman, who is now deceased. He died, as nearly as I can recollect, in February, 1862, at No. 1616 Chestnut street, in the city of Philadelphia. The said Albert G. Waterman was one of the trustees in a mortgage of the Cairo & Fulton R. R. Co. of Missouri. I know this fact because at the time he became such trustee I was secretary of the land department of said railroad company, and remember that the president requested my father to act as one of the trustees, and my father consented and was appointed one of the trustees. I was familiar with my father's handwriting in his lifetime. (Deed, John Moore, John Wilson, and Albert G. Waterman, trustees, to Thomas C. Adams, dated January 3rd, 1859, shown witness.)

"This deed now shown me, which I have marked in the upper right-hand corner with my initials and the date, was signed by my father. The signature, 'A. G. Waterman,' at the foot thereof is his signature. The signature, 'J. Spencer Waterman,' to the ac-
65 knowledgment is my signature."

Defendants objected to the introduction of this testimony on the ground that the decree could not be attacked in that way.

Plaintiffs read in evidence the deposition of ISAAC VAN NOSTRAND, who testified that he was 68 years old, resided in Illinois, and that he knew John Moore, who lived in that vicinity; that Moore died in the city of Boston, Mass., September 23, 1866. He was at one time lieutenant governor of the State of Illinois and at another time treasurer of that State; that he knew his handwriting, and he identified the signature of John Moore to exhibit, being deed for trust land executed by Moore, Wilson, and Waterman, trustee-, 3rd of January, 1859, to Philip Holder for 80 acres of land.

Defendants' counsel objected to the introduction of that testimony on the ground that it was irrelevant and immaterial, and that if it is proposed to prove the handwriting of Mr. Moore it could not be done by comparison.

Plaintiffs then offered in evidence the original record kept by the trustees, in the mortgage of Moore, Waterman, & Wilson, of their proceedings as such trustees, and proposed to read order No. 5, as follows:

Office of the board of trustees of the Cairo & Fulton Railroad Company in Missouri.

SPRINGFIELD, ILL., *March* 22, 1866.

Upon official information of the death of Albert G. Waterman, a member of this board, whereby a vacancy is created, etc.

(Signed) MASON BRAYMAN,
President of the Board of Trustees.

Defendants' counsel objected for the reason that the same was hearsay, and therefore incompetent; which objection was overruled by the court and the action of the court excepted to by defendants.

Plaintiffs' counsel offered in evidence the declaration of
66 John Wilson, signed by him, dated March 22, 1866, as follows:

OFFICE BOARD OF TRUSTEES,
CAIRO & FULTON RAILROAD, *March* 22, 1866.

Under authority of the power vested in us by a certain deed of trust executed by the Cairo & Fulton Railroad Company of Missouri, dated May 23, 1857, we, as surviving and remaining trustees, do hereby appoint and constitute Mason Brayman, of Illinois, trustee to fill the vacancy caused by the death of Albert G. Waterman, an original trustee named in said deed.

Witness our hands and our official seal the day above written.

(Signed) JOHN WILSON, *Trustee.*
MASON BRAYMAN,
Trustee and President.

Sealed with the seal of the board of trustees of the Cairo and Fulton railroad.

Defendants' counsel objected on the ground that it is hearsay, and excepted to the action of the court in admitting the testimony, and because John Wilson did not constitute a majority of the board, and therefore could not make the appointment.

Plaintiffs offered in evidence certificate of appointment as heretofore set out, the record from the book in page 69 of the record of the board of trustees of the Cairo & Fulton R. R. Co.

Plaintiffs offered in evidence the 8th clause in the deed of trust, and in connection therewith offered No. 1, page 69 of the record kept of the board of trustees of the Cairo & Fulton R. R. Co., as follows:

Office of the trustees of the Cairo & Fulton Railroad in Missouri.

SPRINGFIELD, ILL., *May* 7, 1858.

By virtue of the provisions of a certain deed of trust executed by the Cairo & Fulton R. R. in Missouri, party of the first
67 part, and the undersigned trustees, party of the second part, bearing date May 23d, 1859, we hereby constitute and appoint Mason Brayman, of Springfield, Ill., president of the board of trustees, etc.

(Signed) JOHN MOORE.
JOHN WILSON.
A. G. WATERMAN.

To which record the defendants objected because it is hearsay and because it is not properly authenticated, is irrelevant and incompetent.

Plaintiffs offered in evidence papers already offered dated March 22, 1866, headed "Office of the board of trustees of Cairo & Fulton R. R." (see page —, Abstract); also order No. 5, found on page 96 of the Record of the Board of Trustees heretofore offered. (See page —, Abstract.)

Plaintiffs offered in evidence special act of the legislature of the State of Missouri relating to the sale of the Cairo & Fulton R. R., approved February 19, 1866, entitled "An act to provide for the sale of certain railroads and property by the governor to foreclose the State's lien thereon, etc.," among which is the Cairo & Fulton R. R. Acts 1864–'5, pages 107–'23, General Assembly.

Defendants objected on the ground that the act of the legislature specially excepted the land in controversy from the operation of the statute; which objection the court overruled, and to which action of the court defendant excepted at the time.

Plaintiffs then offered in evidence certified copy from the office of the secretary of state of the deed made pursuant to the act above set forth, whereby the property described in that act of the Cairo & Fulton R. R. was conveyed to the State of Missouri on the 1st day of October, 1866.

Plaintiff then offered HORACE D. WILLIAMS as a witness,
68 who testified in substance as follows: That his residence is Poplar Bluff, Butler county, and that he was the secretary and treasurer of the F. G. Oxley Stave Co. Witness was asked the question, What, if anything, do you know of that company by F. G. Oxley, as trustee, towards taking possession of the land of Charles P. Chouteau?

Defendants' counsel objected to the question for the reason that there is no averment of plaintiff's possession in the bill, but that the actual possession of plaintiff is negatived by the averments in said bill. Objection overruled; to which action of the court defendant excepted.

Witness answered: "We immediately began to cut off timber and delivering the same to our works at Poplar Bluff. We caused the land to be surveyed. We employed Mr. Lane and a corps of men, who cut the lines and staked off the different sections, quarter sections, and half sections. We caused a complete description of the land to be made and the quality of the land, the quantity of timber and a complete record of it. He testified that when he said "cut lands" he meant cutting the boundary lines of the section—that is, cutting the timber through, cutting the bush out so it would form a line of boundary of the timber, blazing the trees, etc.—that is, cutting the bark off the side of the trees.

In answer to the question, Q. Now, I suppose everybody understands what is meant by that blazing the trees?" witness answered, "Cutting the bark off the side of the tree as you go along—say, 15 trees between here and that pillar there. That is the boundary line on this side, and they cut the bark off at the side of the trees as they go along."

Q. To what extent, so far as this land is concerned, is that done?

A. All of it; every acre of it.

Q. When was that done?

A. It was done in 1887.

Q. You spoke of Mr. Lane. What profession, if any, did he follow?

A. He was a surveyor. He used to be, I believe, the county surveyor of Butler county. He was employed by me for the Oxley Stave Co. to do this work. He made a list or caused it to
69 be made by his men showing all the occupants of the land, all the people who claimed title to the land, if any. He made a complete description of the land all the way through, and a plat of it.

Witness further said that he went over the land at first to see about timber thieves, and then again he went over the land with a view of deciding as to the advisibility of building a railroad through it. He said they were figuring on extending the road that now runs from Neelyville east towards the Black river, and they figures on the feasibility of bridging Black river and extending that road through, but after going over the land, spending two or three weeks to make a survey and inspecting it and its timber, he concluded that it was best if they did build a railroad to build it north and south in the center of the track, and he went to the range line up through the land to test that, and hence went over the land. He spent about three weeks in this business. In answer to the question, "What did you do on the land?" witness answered, "I discharged the superintendent and hired another one." I recollect that very distinctly. I changed the policy of doing things there, and I also lodged some information relative to timber thieves when I returned to Poplar Bluff. I think Mr. Lane was employed five or six months or more. It was a very long, tedious operation to determine the boundaries and establish them by blazing trees, etc. Lands were laid around the whole track—every section and every forty and every eighty he staked a blaze. He did not run off the entire tract in a body, but laid it off in subdivisions. Where a whole section was in a body that was surveyed as an entire section, the line cut right around it. In answer to the question, "Did you give directions to Mr. Lane?" witness answered, "Oh, yes." In answer to the question, "When you sent men to cut timber after it was thus marked off, what was the process?" he answered, "We had a surveyor of our own; he would locate a principal section, a quarter section that the men would go upon; we had men scattered all over the woods. Every man had his portion to work on. Every man or firm, 2 or 3 or 5 or 7 men, perhaps, camped together,
70 and that piece was laid off for them by our surveyor-, Mr. Crane and Mr. Hicks. One man would have 40 acres, say the southeast portion of a section, and he would cut the timber and make it into staves; then the inspector at the end of the month would inspect the staves and make a record of it on an inspection card. Say John Jones, section 1, township so and so, has cut during this month so many thousand staves. These staves he would inspect and after inspecting he would brand them, and that card was turned into the superintendent of the works and he would approve it; then it would come to the office and go on the pay-rolls from this inspection card. The pay-rolls would be sent with the

cash down to the men; the men would sign the pay-rolls and receive the money when they were paid off for all their work that was done, and he said that they had employed men continuously to watch the land and had paid them salaries. These men would ride over the land from one end to the other, trying to keep men from stealing timber, so that the work went on right, where there was any work going on, and making reports on the different contractors working in timber, and taking a general supervision of the land. This we have done since we bought it in 1886. Shortly after it was conveyed by Mr. Chouteau to the Oxleys. The land lies between the St. Francis and Black rivers, in Butler county, starting at the Arkansas State line. Some of it is in large bodies, as many as several thousand acres, but it is scattered—40,000 acres of it runs up the C. A. T. road. Some sections are alone. In some places quarter sections and half sections are alone.

Witness stated that he had all the tax receipts for these lands since the purchase by the Oxleys from Mr. Chouteau, and exhibited certain papers which purported to be receipts for taxes in 1887, 1888, 1889, and 1890. Witness stated that the taxes had all been paid by the F. G. Oxley Stave Company from the time of the purchase of Chouteau to the date of the last taxes in December. In answer to the question, "State whether or not your company has paid the taxes during all this time on these lands," witness answered, "I could not state that definitely, because I have not gone over
71 these tax receipts and checked them up, but, so far as I know, we have bought all the land entire. It is my intention to do so. The property is assessed in the name of F. G. Oxley, trustee, or the F. G. Oxley Stave Co. The Oxley Stave Company have some tenants on these lands. There is one by the name of Curdee. There is another named Felix Allen. There is another named Col. Hortsmann. I cannot furnish all the names of the tenants. Felix Allen is one of our tenants.

Defendants' counsel objected to this testimony for the reason that the averment in the bill is that plaintiffs are not in actual possession of this property; but the court overruled the objection, and the defendant excepted.

Witness, continuing, said he paid in rent June 30, 1890, $4.28, and Wm. Curdee paid $5.00 a year, Horstmann, $12 a year. Witness says there was a saw-mill located on section 25, township 24, range 7, of this land. They found that a man named Johnson, who owned a mill, had a tramway over their section, and they sent a force of men there in June, 1889, and destroyed his tramway.

To all of which testimony defendants objected because it is incompetent and inadmissible; and the court overruling their objection, they excepted.

Johnson afterwards stopped his mill and took it away. Witness said from the time of the purchase of the land they employed a man to watch it. They immediately found that timber thieves were at work upon it removing timber, and they have instituted suit a

great many times, seizing the timbers, etc. In one instance we seized some $3,000 or $4,000 worth of ash timber and logs that were in the river. In another instance we seized a large quantity of cypress timber that was on the banks. We paid $100 reward for one man, a timber thief, before we could get him. He fortified himself and we could not get him by the ordinary officers of the law, and we paid $100 to get him. We have done everything in
our power to protect the land from timber thieves and every-
72 thing possible we could to prosecute them after we caught
them. We have looked after this land from one end of it to the other—from the State line and the farthest point north of the line and east and west. Our efforts to protect the land have been continued since 1866.

On cross-examination witness said that the Oxley Stave Company had never, to his knowledge, arrested a man and prosecuted one who showed any title. He was not present when the tramway was torn up, but ordered it done. This tramway was torn up without Johnson's consent. The land was surveyed and blazed in order that the company might know its land.

On further cross-examination by Mr. Grove the following occurred:

"Have you ever been on section 23–8? I have reference now to the land you charged as belonging to the St. Francis Lumber Company as being claimed by them. Have you ever been in their yards?

A. I have been there.

Q. That is, on section 23 of 23–8?

A. Yes, sir; I was there in 1887 and not since that time.

Q. In 1887, when you were there, did you know whether they had a lumber camp right in that vicinity or not?

A. I don't think they had. My recollection is that the only lumber camp that I saw on that trip was somewhere down here, near 31. I cannot locate it on this map, but it is on the St. Francis river, about opposite, say 32, somewhere in there; they were logging there then.

Q. Were they logging in section 23, any part of it?

A. I don't recollect.

Q. You don't remember?

A. I don't remember of seeing any logging other than I saw on the Black.

Q. You do not pretend to locate that lumber camp definitely?

A. This particular 23–8 section? No; other than that I was
through there. Mr. Pierce owned some land near there and
73 above there, and we crossed through it in a general way.
We were over Pierce's land and our land at the same time. We went up the St. Francis, cut back over here to Kelly's, back over to St. Francis again, and up that way.

Q. You know that they had a lumber camp there, do you not, in that neighborhood?

A. Yes, sir; they had this lumber camp here; that is one camp that I recollect of.

Q. What do you mean by "here"?

A. Down near the State line; about 32, I should think—32 or 29; I cannot locate it now.

Q. Was it 23–8?

A. No.

Q. You saw no lumber camp on 23–8?

A. That is 24–8.

Q. I think that is the township. Yes (referring to map). Yes; that would be 23, township 23—that is, township 23, range 8. The only place I recollect of a lumber camp on the St. Francis river was about section 32 or 29, but I do not pretend to be able to locate the exact section it is on. I know they had such a camp and were there at work.

Redirect examination:

Q. What is the distance between 23–8 and either 29 or 32?

A. The distance here by sections would be eight miles N. E. on section Mr. Groves refers to.

Q. Have you any recollection of having seen a lumber camp or logging camp?

A. Yes, sir.

Q. Did that make an impression on your mind so that you could locate within a distance of a mile or two?

A. Yes; I have located it within a mile or two. It was on section 29 or 31; right along in there, near the east line of the St. Francois river. I have met a man who said he was connected with the St. Francis Lumber Company. I do not know him further than what he said. Mr. Johnson never made any claim of title, any claim to the land that the tramway was upon.

THOMAS N. LANE testified that he lived at Poplar Bluff; that he had been county and probate judge, public administrator and county surveyor; has been county surveyor part of two
74 terms; that he was employed by Mr. Williams, of the Oxley Stave Company, in 1887 to survey all of their lands in the county and commenced work on the 18th day of September. The work was to survey the exterior lines of their land, and where they lay in bodies of more than one section of the section lines would be surveyed that he was to open the lines by removing the brush and then to blaze all trees near the line and on the line, and that he did this by peculiar blazes, the larger part of it being by a distinguishing mark. After he passed the line that bounded township 22 and from there north he would make a blaze on the side of the tree directed towards the line, first make a straight hack and across that a blaze, so that it could be distinguished from hunters' blazes and surveying blazes of other timber that might be in the timber; that he also put a post at our quarter-section corner, also at the section corner, 4 inches square, out of the most durable of timber—

mulberry or sassafras—and it was an easy matter after the completion of the survey for any man to ride on horseback and follow up the line. The work was completed some time in May, 1888; that they were occupied almost continuously from September to May.

On cross-examination witness said that while doing this work he saw other parties removing staves from the land or bunching staves; he found, also, clear and uncultivated grounds upon said lands, with persons occupying it, and of these he made a list and delivered it to the company; he supposed he found as many as 25 or 30 persons occupying these lands; they had houses and some of them had cleared land; some of them had no cleared ground; the greater number of tracts were occupied.

Further cross-examination by Mr. GROVES:

Q. I think I understood you to say in making these surveys you were directed, among other things, to ascertain whether any persons were on those lands or anything of that kind?

A. Yes, sir; to report any trespassing.

Q. Did you make any report of finding any one in possession or building upon any lands in 23–8?

75

A. I reported some in possession. I reported some parties in possession on 23–8, I am satisfied.

Q. Do you remember now whether you reported the St. Francis lumbermen as being in possession of any part of that land or building upon it?

A. I think I did; yes, sir.

Q. Do you remember what sections you made that report of?

A. Being guided by my memory, I think it was 23–8.

Q. You did find them in possession there and at work?

A. I did.

Q. Did you find any logging camp erected by the St. Francis Lumber Company in that vicinity?

A. I could not state now whether I saw the camp. I was cognizant of the existence of it.

Q. Did you have any conversation with any one that was working there in relation of whom they were employed by, or as to whether they had any claim to the land there?

A. I have no definite recollection.

Q. How, then, did you ascertain that it was the St. Francis Lumber Company of whom you could make that report?

A. I don't remember now. I met some of the parties in the neighborhood. They told me they had a camp there of that company.

Q. And these parties from who you got that information were working there?

A. I say that I do not remember distinctly whom I got the information from.

Q. But you do remember, though, that you got the information?

A. That satisfied me.

Q. Information to satisfy you it was the St. Francis Lumber Co.?

A. Yes, sir.

Q. That was doing that work?
A. Yes, sir.
Q. Now, during any of those conversations among those parties, did you get any information from them to the effect that they claimed the land?
A. I do not remember now.
Q. You do not remember that?
A. No; I only know that they crossed the line that I made and were actually at work on some land that was represented to
76 me as belonging to the Oxley Stave Company in section 23. —. ——?
A. Yes, sir; I met one man with a compass right on the land where I was at work, but I could not state now whether he was operating for the St. Francis Lumber Co.
Q. You do not remember what he told you at the time he was doing?
A. I do not remember what he told me.
Q. Do you know who the man was?
A. I do.
Q. This is the gentleman right here?
A. That is the man.
Q. Mr. Curlee?
A. Yes, sir.

Redirect examination:

Q. What list, if any, did you make of those who were occupying the land?
A. I made a list of about 25 or 30 occupants. Some of their names I could call; others I could not.

Witness is shown a paper and states: "That was made at my direction and is the handwriting of James Hicks, who was estimating timber with us and who is now dead. This list represents those occupying different sections of the Oxley Stave Company's land or parts of section—different tracts. I could not state that it embraced all those I found surveying the land, because I made a list myself, and this might contain all of those and others that he found on the interior of sections. That is the reason I directed him to make the list, because he was estimating timber and went through the section and traversed them, while I went on the exterior line. It might contain more than I reported. It might omit some I reported.

Plaintiff- then offered in evidence a paper just identified by the witness, which may be described as follows:
A map by witness of land claimed by the Oxley Stave Co., showing the lands to be from north to south about 24 miles long, 10 or 11 miles wide, from the most extreme eastern to the most extreme western point.

J. W. WALTERS, another witness for plaintiff-, testified to his residence at Poplar Bluff and to his employment by the Oxley
77 Stave Company since December, 1889, in looking after the

timber lands, staves, etc., of the company, buying stave bolts, looking after timber land on their lands in Missouri, making a trip over the land about once every two weeks on horseback; that the boundaries of the land are established corner stakes being driven in the ground and the lands blazed. He had caused the arrest of several parties who undertook to steal things off the land. The tramway was removed before his employment by the company, but he knows where he was located. He knows that it started on section 25, township 24, range 7, and it ran across section 13, township 24, range 7. Witness indicates on map the location of the mill on section 25, and near the center of that section. On cross-examination witness said he began work in December, 1889, since the institution of suit; that Wilkinson and a man named Giffords were his purchasers in the work of the company; that he had arrested two persons upon the lands. They were on section 23–8. One was on section 23–8 and the other on 14, 23–7; that they were arrested on warrants, and that neither of the parties had yet been tried. One was for cutting and removing timber.

HOWARD DUNHAM, another witness, testified to his residence in Poplar Bluff and his employment with the Oxley Stave Company as cashier and the head book-keeper since October 1st, 1866, and exhibits a list of the land, which he said was given him by Mr. Hicks, now dead, and George Lane.

Plaintiff- offered in evidence the list identified by the witness.

W. M. CRAIG, another witness, testified to his residence in Kingston, Ark., and that he is a surveyor, and his employment by the Oxley Stave Company in 1886 or 1887; that he took charge of the timber production—that is, of staves; that he ran off the line and set the men to work; located the timber for them. The
78 section lines and witness trees indicated the boundaries of the land owned by the Oxley Stave Company; that his work was done before the work of George Lane; that the men for whom he run lines worked on the St. Francis river, on the Charles P. Chouteau purchase. He exhibited what he called a Charles P. Chouteau map, and called off the numbers of the sections and portions of sections whose lines he had run and put men to work upon; that they first started to work on Big island and worked off sections 16 and 17 and 20, and then started over sections 1 and 2; that his land extended over all the Chouteau purchase, but that he quit about the time they were working on section 20; that he worked there about 18 months ago and quit about three years before the trial; acted as foreman of the company. The Oxley Stave Company bought what is known as the McDonnell land. Witness worked for McDonnell before the sale to the company in 1886 or 1887. Witness continued to work after that for the Oxley Stave Company for 11 or 12 months.

Plaintiff- then offered in evidence reports and inspections of staves for the Oxley Stave Company, giving the parties by whom made, section, townships, and range upon which they were made.

Cards were signed by witnesses, and he gave in the cards once a month, and were intended to show who was working the land and what land was worked and the number of staves that were made.

Cross-examination:

These reports, nineteen in number, contained the sum of his knowledge of the transaction with the stave company.

In the course of his examination Mr. Groves, attorney for the St. Francis Lumber Company, asked the following questions and received the following answers, herein set out:

Q. When you were going over these lands, making these inspections of which you have spoken, did you go on sec. 23–8?
A. Yes, sir; I have been across it once.
Q. Did you know about what time that was?
79 A. Well, it was two months after I quit Oxley.
Q. When was that?
A. About two months. I went down below Ash Hill for an inspection of land.
Q. What month in the year?
A. I could not tell you and did not pay any attention.
Q. Do you know what year?
A. It was the same year I quit there.
Q. What year was that?
A. It was in 1888.
Q. Did you find anybody on section 23 working?
A. Yes; I did, and I believe I had a conversation with them and got no information from them as to whether they were working for the St. Francis Lumber Company. I saw no logging camp. I found persons on 23–8; they were cutting logs there, but they did not state for whom they were working.

E. R. LENTZ testified that he was a practicing lawyer, living at Poplar Bluff, and counsel for plaintiff in this case, and in answer to questions testified as follows:

Q. In the preparation of the bill or petition in this case, state what omissions, if any, were made of the portions of the land embraced in the Chouteau purchase by the Oxley Stave Company.
A. The report of the survey made by George Lane that was furnished me showed quite a number—perhaps 25 or 30 persons—in actual possession of small tracts. In different portions of the tract conveyed by Mr. Chouteau to the Oxley Stave Company and in the preparation of the bill the intention was to leave out all those tracts of land that were in possession of other parties. When there was nobody in actual possession, those tracts were omitted from this bill, and ejectment suits are now pending in Butler county against all parties in possession for the purpose of determining the title.

Witness identified three papers containing the names of defendants or ejectment cases pending in Butler county.

Then followed Mr. Warrenton, one of the counsel for
80 plaintiffs:

Stipulation.

On the 13th day of November, 1888, the St. Louis, Iron Mountain and Southern Railway Company brought in the circuit court of Butler county, Mo., an ejectment suit against The F. G. Oxley Stave Company and F. G. Oxley, trustee, for all those lands mentioned in the cross-bill of The St. Louis, Iron Mountain & Southern Railway Company, defendant in this case. This case was transferred in the United States circuit court for the eastern district of Missouri and there dismissed.

The COURT: I suppose the only thing in that is that defendant in that suit was in possession of these lands at that time?

COUNSEL FOR PLAINTIFF-: That is what they charge; that is the only object of the case. It was in that suit claimed that the Oxley Stave Company and F. G. Oxley, trustee, were in possession of the land described in the case.

The COURT: I suppose it is admitted that those allegations are in that petition; that will suffice?

Judge MADILL: Allow me to state what I think you ought to have. The substance of this record is this: On the 13th of November, 1888, The Iron Mountain & Southern R. R. Co., one of the defendants in the suit on trial, filed its petition in the circuit court of Butler county, in this State, for the same premises described in the cross-bill in this case filed by the said Iron Mountain R. R. Company, and that in said petition in ejectment it alleged that the said Iron Mountain & Southern Railroad Company was entitled to the possession of said premises on the 1st day of January, 1883, and that, being so entitled to the possession thereof, the defendants afterwards, on the — of ——, entered into said premises and unlawfully withholds from plaintiff possession thereof, to its damage in the sum of $10,000.

Mr. PRIEST: That may be stipulated in lieu of the record, with the addition that the suit was voluntarily dismissed.

81 Mr. WARRENTON: Was it not dismissed on the stipulation that we would consent to your setting up your claim in this case for rents and profits or damages?

Mr. PRIEST: The suit was dismissed pursuant to the following stipulation filed in this case:

"It is hereby stipulated and agreed that The St. Louis, Iron Mountain and Southern Railroad Company, one of the defendants in the above-stated case, may file therein an amended answer or answer and cross-bill setting up, among other things, a claim for damages done to the lands involved in said suit by cutting and removing timber therefrom and otherwise, and the case shall be tried against said defendant on that as well as the other issues presented in said case, to the end that all questions about damages as well as title may be determined herein. Nothing, however, herein contained is to be construed as an admission that such damages have been done by the plaintiffs."

Plaintiffs then offered in evidence tax bills for 1881, 1882, 1883, 1884, 1885, and 1886, paid by Charles P. Chouteau during the time he held the lands described in the deed from F. G. Oxley Stave Company, trustee.

Defendants objected to the introduction of the tax bills on the ground that they are incompetent, and their objection being overruled, they excepted.

Plaintiffs offered in evidence an assessment-roll assessing the lands against Chouteau during the time that he left them and embracing the years for which Mr. Chouteau paid the taxes.

Plaintiffs offered in evidence an act of the legislature of the State of Missouri approved January 10, 1857 (see Sess. Acts for 1856–'7, p. 263), entitled "An act to repeal an act to ordain and establish the district county court of Butler county, approved March 1, 1855;" to the introduction of which defendants objected on the ground that the same was irrelevant and incompetent.

82 Plaintiffs offered in evidence an act entitled "An act supplemental to an act abolishing the district county court of Butler * * * counties, approved January 10, 1857, approved February 25, 1857. Defendants' counsel objected because the act does not provide for any records excepting those in pending litigation and because it is irrelevant and incompetent.

Plaintiffs offer for the information of the court a perpetual calender of the American Almanac for 1881, calling attention to the fact that the 22d day of March, 1866, fell on Thursday.

Plaintiffs offered certified copy of the articles of incorporation of the F. G. Oxley Stave Company, a corporation organized under the laws of the State of Ohio, dated August 11th, 1886, certified to according to act of Congress, section 906 of the Revised Statutes of the United States. The introduction of the paper is waived and counsel for plaintiff- permitted to state its substance as follows: "The name shall be the F. G. Oxley Stave Company; the place where said company shall be located, its principal office is Cincinnati, Ohio. Said company is formed for the purpose of manufacturing and dealing in staves and headings, in all their varieties. The amount of the capital stock of said company shall be $150,000, divided into 1,500 shares of $100 each."

Also Laws of Ohio, 1889, sections 3235, 3236–3239.

F. G. OXLEY testified that he was president of the F. G. Oxley Stave Co.; that his residence is in Cincinnati, Ohio; that the company had been in business since 1886; that the company had a very extensive plant for its business for the manufacture of all kinds of cooper staves, staves, headings, barrels, shots, and casts at Poplar Bluff, Mo.; that the business of the company was very extensive, the products of their mills were shipped all over the country—all over the United States; in Canada, in Cuba, Liverpool, German-, and France.

Q. What uses have you been making of the land in controversy?

A. Until recently in connection with this litigation we

83 have been working off as we needed it—timber off this land.

Q. What, if any, necessity for this land was there on the part of F. G. Oxley Stave Company in doing its business as you have described?

A. Well, sir, the purpose of purchasing the land was to further the business and to be used in the business—that is, the product of the land.

Q. Are these timber lands?

A. Yes, sir.

Q. What uses do you make of the timber upon it?

A. We make it into staves and ship the staves or make packages of different kinds and ship them to different markets—ship some in staves and some in packages. I am the F. G. Oxley named in the deed and am trustee for the company of which I am president. The trust expressed in that deed is in reference to these lands.

Cross-examination:

Q. What was your object in taking the deed to these lands yourself as trustee?

A. Well, sir, I don't know that I can say just what was. I think it was the general impression that the laws required a corporation to carry their lands in some such way.

Q. Then the title you took to yourself as trustee to evade what you supposed to be a constitutional inhibition against bank corporations holding in Missouri?

A. How is that?

Q. You took the title yourself as trustee to evade the provisions of Missouri laws, which, as you suppose, did not allow a corporation, being foreign, to hold lands in Missouri?

A. But I cannot say it in detail as you say it. It was decided upon in council by our people that the deed better be made in that way.

Here it was agreed that plaintiffs' case, except as to certain deeds, was to go over until the 27th of February, and that the following evidence on the part of some of defendants might be heard. Here defendant The St. Francis Lumber Company offered in evidence the patent from Butler county to that company, dated the 14th of November, 1887, described as follows.

84 And immediately after the patent plaintiffs objected to the deed or the patent on the ground that it did not appear that the prerequisites of the statute had been complied with under which swamp land should be sold in a certain manner *to* and advertised a certain length of time; that there was no proof that there was any advertisement or that the sale was conducted in conformity with the law.

The court admitted the testimony, subject to plaintiffs' objection.

The defendants The St. Francis Lumber Co. then offered ZEBEDEE B. CURLEE, who testified that his residence was in Tamaroa, Ill.; business headquarters at St. Francis, Clay Co., Ark.; that he went into the employ of the St. Francis Lumber Company in 1887; that

he knew the location of section 23, township 23 N., range 8 east, in Butler county; that he was on that section on the 3rd of December, 1887, at the instance of the St. Francis Lumber Co. or the superintendent of that company; that he was there frequently during that winter. I saw where some ash logs had been cut from lots 7 and 10, and was told by the superintendent of the St. Francis Lumber Co. that he had them cut. This was on 7 and 10, section 23, R. 8 east. The St. Francis Lumber Company had a camp at that time near there, which I understood was erected under the direction of the manager of that company, under the personal supervision of Jos. Hicks, who was the logging boss. That company had from 15 to 25 men at work. The logging camp was on section 26, about 30 rods from the south edge of section 23. The hands that did the work boarded there, and the teams boarded there that worked on sections 26, 23, 24. Lots 7 and 10 are in section 23; that he had seen the patent, and had talked with the members of the St. Francis Lumber Company in relation to the title and their rights under it.

By defendants' counsel, Mr. GROVES:

Q. Do you know whether they were doing this work and took possession of that land under a claim through this patent?

A. Probably I can make it explicit enough to be clear.
85 When I went to work for them they told me they had bought certain lands and showed me upon their plats the land they had bought. I went and traced the lines to these lands and continued to look over them from that time forward. At one time Mr. Green, who was the successor of Moody as general manager, said to me, "Go up and look at our lands up the river, and see if there is any trespass on them." I said, "I do not understand as to what lands you own." He said, "I will show you the patents," and he got his bundle of deed- and patents and I looked them over and made a note on my plat of the lands that the patent showed, and among those were lots 10 and 7, in sec. 23, township 23, range — east.

Q. Have they been, in your knowledge, continually in possession of that logging camp ever since?

A. They have. If it was vacated at all, it was during one spell of high water that they moved out to high ground.

Q. That was simply temporary?

A. Yes, sir; they still kept their things in it.

On cross-examination witness said he was not interested in the company; was only in its employ; that he was an agent of the St. Francis Lumber Company to look after their land and do their business at special request. His headquarters are in St. Francis, Arkansas, about 15 miles from the land; that he is on the land sometimes every week; sometimes not for two or three or four months; that lots 7 and 10 are fractional lots. When the section is cut by the river, which is the county line, the general surveys designate the fractions as lots. These fractions are in the half section of 23, which is cut by the river; consequently that half section is divided into

lots and numbered from one to ten; that there are 35 miles and a fraction in lot 7 and 40 in lot 10. Lots 7 and 10 are in section 23; that he had testified that the company owned lands in 26, 23, and 24. There is lot six in 26, 23, and 24. There is lot six in 26 that this company claims to own, containing about 31 acres in the south part of it, and lot four, in the same section, about 23 acres,
86 and lot 2, about 59 acres, in that section; lots 7, 5, 6, 4, and 2, in that section, belonging to the St. Francis Lumber Co.; that none of the lands are embraced in the suit except lots 7 and 10, so far as witness knows. The company was working on lots 7 and 10 in December, 1887; that he had been arrested at the instance of the plaintiffs some two years before the trial for stealing timber; that he attended the trial and the case was continued two terms and at the third term dismissed; that they commenced a replevin suit against him once in the State of Arkansas, but made no appearance in the case, and it was dismissed. Lately, while in the employ of the St. Francis Lumber Company, he was arrested by the constable and brought before a justice of the peace on the charge of stealing, taking, and carrying away $200 worth of timber from the lands of the F. G. Oxley Stave Co., and that this case was still pending.

Counsel for the St. Louis, Iron Mountain & Southern Railway Company:

Q. Don't you know that lot 7 is embraced in a conveyance of Butler county to the St. Louis, Iron Mountain & Southern Railway Co.?

A. I think I have learned that from some proceedings that I have seen, either in the bill or otherwise. I think I learned that they laid claim to that lot.

Mr. WARRENTON, of counsel for plaintiff-: I offer from Revised Statutes of Ohio, which were in force during 1866, revision having been adopted June 20, 1879, sections 3235, 3236, and 3239, relating to the incorporation of companies in that State, as follows:

"SEC. 3235. Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, excepting for dealing in real estate or carrying on professional business, and if the organization is for profit, it must have a capital stock.

"SEC. 3236. Any number of persons not less than five, a majority of whom are citizens of this State, desiring to become incorpo-
87 rated, shall subscribe and acknowledge before an officer authorized to take acknowledgments of deeds, articles of incorporation, the form of which shall be prescribed by the secretary of state, which articles shall contain, first, the name of the corporation which shall begin with the word 'the' and end with the word 'company,' unless the organization is not for profit; second, the place where it is to be located or where its principal business is to be prosecuted; third, the purpose for which it is formed; fourth, the amount of its capital stock, if it is to have a capital stock, and the number of shares into which the stock is divided.

"SEC. 3239. Upon such filing of the articles of incorporation (that is to say, with the secretary of state) the persons who subscribe the same, their associates, successors and assigns, under the name and style provided therein shall thereafter be deemed a body corporate with succession and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real and personal estate, as may be necessary and convenient to carry into effect the objects of the corporation; to make and use a common seal and the same to alter at pleasure and to do all needful acts to effect the objects for which it was created."

Plaintiffs' counsel then introduced deeds as follows:

(1.) Deed of Butler county to Geo. F. Emerson, dated the 3rd day of August, 1869, filed for record the 5th day of August, 1869, recorded in Book F, p. 110, conveying certain of the lands.

(2.) Another deed of Butler county to Geo. F. Emerson, dated the same day, and filed for record on the same day, conveying certain other of the lands.

(3.) Another deed of Butler county to George F. Emerson, of same date and filed on the same day, conveying certain of said lands.

(4.) Deed of Butler county to Sarah M. Emerson, wife of John W. Emerson, dated the 3d day of August, 1869, filed for record same day, for certain other of said lands.

88 (5.) Deed of George F. Emerson and John W. Emerson and wife to Melville F. Moore, dated April 18, 1870, filed for record April 20, 1870, for certain of said lands.

(6.) Deed of Melville F. Moore to Charles D. Yancy, dated 23d of January, 1870, conveying certain lands.

(7.) Deed of Charles D. Yancy — Wm. Playmaker, dated 23d day of January, 1870, filed for record 7th of February, 1871, conveying certain of said lands.

(8.) Deed from Melville F. Moore to Geo. F. Emerson, dated April 18, 1870, filed for record on the 30th day of April, 1870, conveying certain lands described as follows.

(9.) Deed from George F. Emerson, by sheriff of Butler county, to Alfred Kelly, dated May 7, 1880, filed for record July 5, 1880, conveying certain lands.

(10.) Deed from John W. Emerson and wife to George J. Heyer, dated 22d day of October, 1866; filed for record 7th day of May, 1870.

(11.) Deed from George J. Helper (or Heyer) to Richard E. Hueler, dated 25th of October, 1866, filed for record on the 29th of December, 1871, conveying certain of said lands.

(12.) Deed of R. E. Hueler and wife to Hannah Webster, dated March 27, 1874, conveying certain lands.

(13.) Deed from Hannah Webster to D. B. Emmons, 12th day of April, 1875, filed for record 21st day of May, 1881, conveying certain lands.

(14.) Deed from D. B. Emmons, by sheriff of Butler county, — P. E. Kinser and others, dated the 20th day of May, 1884, conveying certain lands.

(15.) Deed from Elias E. Kinser to John Lingle, dated the 23d day of March, 1886.

(16.) Deed of George D. Emerson — Fannie M. Markham, dated 3rd day of December, 1869, conveying certain of said lands.

(17.) Deed from Butler county to Alfred Pedigo, dated June 5, 1850, to certain of said lands.

89 (18.) Deed from John Snoddy, as trustee of Pedigo, to Alfred Kelly, dated April 18, 1870, to certain of said lands.

(19.) Deed of the St. Paul Episcopal church, by trustees, to David Blumeyer, dated the 16th day of March, 1870.

To the introduction of each of these deeds defendant objected because it was irrelevant. The court overruled the objection; to which action of the court defendant excepted.

Plaintiffs offered in evidence certified copy from the office of the secretary of state of the election of W. B. Adams to the office of the clerk of the county court of Butler November 2, 1886; also certified copy from the office of the secretary of state of the election of the same person to the same office November 4, 1890.

Plaintiffs then offered in evidence the deposition of W. B. ADAMS to show that he was the actual custodian of the records of the district county court of Butler county 14th of April, 1891, as follows:

Q. State your name, age, occupation, and place of residence.

A. W. B. Adams; clerk of the circuit court, Poplar Bluff, Mo.

Q. State your age?

A. My age is thirty-six years.

Q. What official positions have you held in the county of Butler and how long have you held those positions respectively?

A. I have held the office of county treasurer four years; office of county clerk four years.

Q. You are now county clerk, are you not?

A. Yes, sir.

Q. As county clerk of Butler county, you are also custodian of the records of said county and of the county court of said county, are you not?

A. Yes, sir.

Q. State whether or not the records of the court known as the district county court for Butler county, which was in existence from 1855 to 1857, *and* preserved as a part of the records in the office of the county clerk of Butler county.

90 A. I don't know just what years, but the records of the district county court are in the office, but for just what years I don't remember.

Q. Can you by reference to the records in your office say whether the records of the district county court for Butler county, which are preserved in your office, were the years of 1855 to 1857?

A. Yes; I can.

Q. Will you make such examination, and, after having done so, make answer as to whether these records cover the time above named?

A. Yes, sir.

Q. As county clerk of Butler county are you also the custodian

of the records of said district county court, which are preserved as a part of the records of the office of the clerk of the county court?

A. Yes, sir.

Cross-examination:

Q. Mr. Adams, are you prepared to state that there are in your office all the record- of the district court to which you have referred, or do you mean to say that you find certain of the records and papers belonging to that court in your office?

A. I can't say that they are all there; certain records belonging to that court are there, but cannot say whether they are all there or not.

Q. In answer to a question by plaintiffs' counsel you state that you are the custodian of the district county court records in your office. I ask you to state if you do not mean to say that you simply find such records in your office.

A. They are there in my charge and care. I found them there when I went in the office and they are still in my care and custody.

Q. You don't know how they got there or by what authority, if any, they were placed in the county clerk's office?

A. I do not.

Redirect examination:

Q. In answer to question by defendants' counsel you say that you do not know by what authority the records of the dis-
91 trict county court were placed in the office of the county clerk. I will now ask you whether those records have been preserved and recognized as a part of the records belonging to the office of the county clerk of Butler county.

Objected to because it is irrelevant and incompetent and not best evidence, and because the opinion of the witness on that subject is immaterial, and because it calls for testimony purely hearsay. Question withdrawn.

Q. State whether or not the record- of the district county court of Butler county have been preserved as a part of the records of the office and whether they have generally been recognized by persons dealing with that office as a part of the records belonging to the office of the county clerk of Butler county.

Objected to because it is irrelevant and incompetent whether such records have been regarded by the persons named by the plaintiffs' counsel in the records of that office or otherwise, and because defendants cannot be affected by the action of the clerk of the county court in preserving said records, and because the testimony sought is on that account immaterial.

A. As to the question, I would say that the records have been recognized as a part of the record- of the clerk's office.

Q. Have the records referred to been so regarded as a part of the records belonging to the office of the county clerk by the officers of the county court of Butler county?

Same objection as to the former question.

A. They have.

Recross-examination:

Q. To what particular officers of the county court do you refer, and in what manner have they so recognized such records?

A. I refer to former county clerks and to judges of the county court. They simply come in and call and want to see the records of the county court, naming the different books.

Q. Did they call for the records of the district county court?

A. I don't remember of them ever calling for the record- of the district county court.

92 Q. There was a county court in existence at the time of the district county court, is there not?

A. Cannot tell without examining the records.

Defendants' counsel objects to questions relating to this witness' custody of the records of said court on the ground that such questions are irrelevant and incompetent. The court overruled said objection, to which defendants' excepted.

Plaintiff- then offered, for the second time, order No. 1, page 69 of the Record of the Board of Trustees of the Cairo & Fulton R. R., made May 7, 1888, as follows:

Office of the trustees of the Cairo & Fulton Railroad Company of Missouri.

SPRINGFIELD, ILL., *May* 7, 1858.

By virtue of the provisions of the deed of trust executed by the Cairo & Fulton R. R. of Missouri, of the first part, and the undersigned trustees, of the second part, bearing date May 23d, 1857, we hereby constitute and appoint Mason Brayman, of the city of Springfield, president of the board of trustees herein provided for, to hold during the continuance of said trust, with such powers and duties as are therein provided for and may from time to time be prescribed by this board of trustees; and we further appoint and provide that the compensation of the president of the board of trustees shall be $4,000 per annum, and that of each member thereof $500 per annum.

(Signed) JOHN MOORE,
JOHN WILSON,
A. G. WATERMAN,
Trustees of the Cairo & Fulton Railroad of Missouri.

Plaintiff- then offered the following document:

Office of the board of trustees of the Cairo & Fulton R. R. of Missouri.

MARCH 22, 1866.

93 Under authority of the power vested in us by the certain deed of trust executed by the Cairo & Fulton R. R. Co. of

Missouri, dated May 23d, 1857, we, as surviving and remaining trustees, hereby appoint and constitute Mason Brayman, of Illinois, a trustee to fill the vacancy caused by the death of Albert G. Waterman, original trustee named in said deed.

Witness our hands and official seals the day above written.

(Signed) JOHN WILSON, *Trustee.*
MASON BRAYMAN,
Trustee and President.

[B'd of Trustees' Seal, C. & F. R. R. Co.]

Plaintiff then offered from the Record of the Board of Trustees of the Cairo & Fulton R. R. Company order No. 5, p. 96:

Office of the board of trustees, Cairo & Fulton R. R. of Missouri.

SPRINGFIELD, ILL., *March* 22, 1866.

Upon official information of the decease of Albert G. Waterman, of Pennsylvania, a member of the board, whereby a vacancy is created in the office of trustee, it is ordered that in compliance with the 8th clause of the original deed made May 23, 1857, as found of record on the 8th page hereof, and by authority therein conferred, we do hereby appoint, constitute, and designate Mason Brayman president of this board of trustees, to fill the vacancy thus created, to hold office for the time, to perform the duties, and to have the powers provided in such original deed as in the case of an original trustee. Ordered that a certificate of such appointment, under the seal of this board, be furnished the proper authorities of the Cairo & Fulton railroad of Missouri.

(Signed) M. BRAYMAN, *President.*

To these several orders defendants objected on the ground that they were hearsay, irrelevant, and incompetent; which ob-
94 jec*jection* the court overruled, and defendants excepted.

Plaintiff then offered in evidence the deposition of HENRY H. BEDFORD, taken on the 17th day of February, 1891, as follows:

Q. What is your name?
A. Henry H. Bedford.
Q. How old are you?
A. At my last birthday I was 68 years old.
Q. Do you remember the date of the organization of the Cairo & Fulton Railroad Company?
A. I don't know that I can say I remember the date; it was about 1853, though.
Q. Were you in the year 1861 in any way connected with that railroad company?
A. Yes, sir.
Q. What was your relation to the company in 1861?
A. Well, I think I was one of the directors at that time.
Q. Prior to that time had you acted for that railroad company in perfecting or procuring transfers of swamp and overflowed lands from Butler county to that company?

A. Yes, sir; I had acted in different capacities; I acted part of the time as an agent soliciting stock, and in that capacity I visited in company with some others the different counties and insisted upon their taking stock.

Q. As agent of the company did you receive a subscription to the stock of the Cairo & Fulton R. R. Co. by Butler county?

A. I don't remember, sir, whether I was the instrument or the agent that obtained that stock or not, but I know that Butler Co. did take some.

Q. Subscribed to the stock of the railroad?

A. Subscribed to the stock of that road.

Q. Do you know whether or not Butler county, through its agent, voted upon that stock and exercised the usual rights of ownership?

A. I do.

Q. As one connected with the railroad company do you know that?

95 Defendants' counsel objects to the question, as the best evidence of the fact is the record of the railway company.

Q. Do you know where the records, the stock books and records, of the Cairo & Fulton R. R. are?

A. I do not, sir; the last I know anything at all about them they were delivered to Tom Allen or to his agent by the officers of the Cairo & Fulton R. R. Company at Bloomfield.

Q. Thomas Allen having acquired stock in the Cairo & Fulton R. R. Company?

A. After the purchase of the Cairo & Fulton Railroad Company they were turned over to him.

Q. But do you know as a matter of fact that the county of Butler voted upon the stock which it had subscribed to the Cairo & Fulton R. R.?

A. I do.

Q. Do you know whether or not it received a certificate with the stock?

A. I know there was a certificate issued to it.

Q. You don't know what that certificate is now?

A. I do not, sir.

Q. You have stated, I understand, that you were a director of the railroad in 1861?

A. Yes, sir.

Q. Will you tell us or describe what was done with the road at that time and the reasons for those things?

A. The road up to that time had been — we had been working on it, using all the means we could to build the road, but in 1861 a Federal officer took possession of the east end at Bird's Point and the company abandoned the road.

Q. Do you know whether the tracks were in fact torn up or not?

A. The track was torn up, I know.

Q. Do you know whether the organization was abandoned at that time?

A. The organization was abandoned during the war; there was nothing said or done that I know of during two or three years.

Q. During what time?

A. From some time in 1861 until in the latter part of 1864.

96 Q. Do you know whether in fact any elections of directors were held between the years 1861 and 1864?

A. I don't think there were any, sir.

Q. You held your office during these three years by virtue of your election in April, 1861?

A. Yes, sir.

Q. You held over?

A. Yes, sir; held over because there were no successors.

Q. Do you know who was the president of the Cairo & Fulton Railroad Co.—whether in fact there was any president in 1864?

A. None, except the man that had been elected prior to that time.

Q. Who was that?

A. I believe it was Poplin. My recollection is that Mr. Poplin was the last president elected. I think that was in 1860 that he was elected.

Q. Do you know when you were elected a director?

A. Not the last time. I was elected a director on several occasions. Sometimes I was not a director. From the time of the organization up to the war I was sometimes director and sometimes I was not.

Q. Are you familiar with the handwriting of the original trustees in the deed of trust made May 23d, 1857, by the Cairo & Fulton R. R. Company to A. G. Waterman, John Moore, and John Wilson to secure the payment of its 1,600 bonds?

A. Yes, sir; I used to be very well acquainted with them.

Q. Do you know their signatures?

A. I have seen them all write and know their signatures.

Q. Do you know the official seal of that board?

A. Yes, sir.

Q. (Reading:)

"Office board of trustees of the Cairo & Fulton R. Company of Missouri.

MARCH 22, 1866.

Under authority of the power vested in us by a certain deed of trust executed by the Cairo & Fulton Railroad Company of Missouri, dated May 23d, 1857, we, as surviving and remaining trustees, do hereby appoint and constitute Mason Brayman, of Illinois, trustee to fill the vacancy caused by the death of Albert G.

97 Waterman, an original trustee named in said deed.

Witness our hands and official seals the date above written.

[SEAL.] JOHN WILSON, *Trustee.*

M. BRAYMAN,

Trustee and President."

Q. Whose names are subscribed to that instrument?

A. John Wilson's name and Mason Brayman's or M. Brayman.

Q. Do you know the signatures of those gentlemen?

A. I do.

Q. Is the name of John Wilson there the name and signature of the person whose name is subscribed to the deed of trust—that is, the name and signature of the trustee in the original deed of trust?

A. John Wilson is the man, sir, and this is the same man and same signature.

Q. Mason Brayman, is that his signature?

A. That is Mason Brayman's signature; yes, sir.

Q. Is that the seal of the board of trustees of the Cairo & Fulton R. R. Company?

A. That is what I think it is. I am familiar with it, and I think that is the seal.

Q. (Exhibiting to witness the original deed of trust made by the Cairo & Fulton R. R. Co. to A. G. Waterman, John Wilson, and John Moore on the 23d of May, 1857.) Are the signatures of John Wilson and Mason Brayman subscribed to the deed of appointment referred to the signatures of John Wilson and Mason Brayman whose names are subscribed to the original deed of trust?

A. The same. Mason Brayman signs it up there (indicating), and the trustees down here (indicating); the John Wilson there, the Mason Brayman there are the same parties and same signature-.

Q. Are you familiar with the handwriting of John Wilson, John Moore, A. G. Waterman, and M. Brayman?

A. With A. G. Waterman's. I have been acquainted with it simply from the fact that it has been on the books of the Cairo & Fulton R. R. Company. I never saw Mr. Waterman write, but John Wilson, John Moore, and M. Brayman I have seen frequently write. I know their signatures and I know the signatures
98 to this are the signatures specified. I know that is John Wilson's genuine signature, and this is Mason Brayman's genuine signature.

By Mr. PRIEST: So that both to the instrument that has been shown you here as an exhibit and to the deed of trust you recognize the signatures of M. Brayman and John Wilson?

A. Yes, sir.

By Mr. LIONBERGER:

Q. (Showing witness records of the board of trustees of the C. & F. R. R. Co. of Missouri, which has heretofore been introduced in evidence, page 69, order 1.) Are those signatures, John Moore, John Wilson, and A. G. Waterman, on page 69 of the Record Book shown to you, the signatures of John Moore, John Wilson, and A. G. Waterman that appear in the deed of trust?

A. Yes, sir.

Q. Order number 2, page 70, are those signatures there the same as the signatures of John Moore, John Wilson, and A. G. Waterman, trustees in the original deed of trust?

A. Yes, sir.

Q. Order number 3, pages 78 and 79, are the signatures of M.

Brayman, John Moore, John Wilson, and A. G. Waterman the genuine signatures of those parties?

A. Yes, sir.

Q. Order number 4, page 80, are the signatures of M. Brayman, John Moore, John Wilson, and A. G. Waterman the signatures of those gentlemen?

A. Yes, sir.

Q. Order number 5, page 96, is the signature of M. Brayman, president, the signature of Mason Brayman?

A. It is.

Q. Order number 6, page 97, is the signature of M. Brayman, president, the signature of M. Brayman?

A. It is.

Q. Do you, as a fact, know whether that record book is the record book of the trustees of the Cairo and Fulton Railroad Company?

A. I know it is the book that they used while they were acting as trustees of the old Cairo & Fulton railroad.

Q. Mr. Bedford, were you ever appointed a trustee in the mortgagee referred to, and, if so, in what manner?

A. At the close of the war—about the close of the war—there was correspondence between myself and Mr. Wilson in reference to the condition of the trusteeship, and through that correspondence
99 we learned the condition of it, and he and Mr. Brayman, as I understood from them, had made an appointment of Mr. Brayman as one of the trustees.

Q. That is, did Mr. Wilson tell you that fact?

A. He did by correspondence. Mr. Brayman and Mr. Wilson notified the board of trustees of the Cairo & Fulton R. R. Co. that it was desirable to have another trustee and asked them to make an appointment, which they did.

Q. Whom did they appoint?

A. They appointed myself; they appointed Henry H. Bedford.

Q. Did you ever serve as a trustee?

A. Yes, sir.

Q. How were you notified of your appointment and when?

A. I was notified of it by Mr. Brayman, and Mr. Wilson notified the secretary of the board that they had made the appointment.

Q. Who made the appointment, the board of trustees?

A. The board of trustees sent my name to them, stating to them——

Q. You mean the board of trustees of the Cairo & Fulton R. R. Co., but not the board of trustees of the mortgage?

A. I mean the directors of the Cairo & Fulton R. R. Co. made an appointment of me and notified Brayman and Wilson of the fact that they had made the appointment.

Q. Did you also receive notice of the appointment?

A. I also received notice from them that I had been appointed, and I received notice through Mr. Johnson, the secretary, that the trustees had received their official information of the appointment of me and authorized me to act as trustee.

Q. Did you notify the trustees in the mortgage of your acceptance of that trust?

A. Yes, sir; I did.
Q. What is that letter (handing paper to witness)?
A. The letter speaks for itself; perhaps that would be better.
Q. You may read it, then.
A. (Reading:)

"Office of board of trustees of the Cairo & Fulton R. R. Co., Mo.

"APRIL 20TH, 1867.

"SIR: The official order of the board of directors of the Cairo & Fulton R. R. Company of Missouri appointing Henry H.
100 Bedford, Esq., a trustee in place of John Moore, deceased, enclosed in yours of the 14th, is this day received. The order has been duly filed and entered of record, thereby constituting Mr. Bedford a trustee, etc.

"Yours, etc.,
M. BRAYMAN,
"*President Board of Trustees.*

"To T. W. Johnson, Esq., sec'y C. & F. R. R. Co. of Mo."

Q. In whose handwriting is that?
A. That is Mason Brayman's handwriting.
Q. That signature is Mason Brayman's?
A. That signature is Mason Brayman's; yes, sir.

The paper referred to is marked Exhibit A and is as follows:

EXHIBIT A.

"Office of board of trustees Cairo & Fulton R. R. Co. of Mo.

APRIL 20TH, 1867.

SIR: The official order of the board of directors of the Cairo & Fulton Railroad Company of Missouri, appointing Henry H. Bedford *by* a trustee in place of John Moore, deceased, inclosed in yours of the 14th, is this day received. The order has been duly filed and entered of record, thereby constituting Mr. Bedrord a trustee.

Yours, etc.,
M. BRAYMAN,
Pres't B'd Trustees.

To T. W. Johnson, by C. & F. R. R. Co. of Mo."

Q. Whose handwriting is that paper (handing witness another paper)?
A. This is Mr. Johnson's.
Q. Do you know his handwriting?
A. I do.
Q. Please read that.
A. (Reading:)

"Office Cairo & Fulton R. R. Co. of Mo.

BLOOMFIELD, Mo., *April 14th*, 1867.

101 SIR: By order of the directory, I have the honor to inform you that by an order of the board of directors of the Cairo

& Fulton R. R. Co. of Mo., dated April 11, 1867, Henry H. Bedford was appointed land trustee to fill the vacancy occasioned by the decease of John Moore, an original trustee, and, furthermore, to inform you that he has duly signified his acceptance of the appointment. Mr. Bedford desires me to say to you that he will be in Springfield to see you soon after the 20th inst.

I am, very respectfully, your ob'd't serv't,

T. W. JOHNSON,
Sec. C. & F. R. R. Co. of Mo.

Hon. M. Brayman, president of board of land trustees of the C. & F. R. R. Co. of Mo., Springfield, Mo."

Q. In whose handwriting do you say this is?
A. This is in Thomas W. Johnson's handwriting. *A.* Yes, sir.

The paper referred to is marked "Exhibit B" and is as follows:

EXHIBIT B.

Office Cairo & Fulton R. R. Co. of Mo.

BLOOMFIELD, Mo., *April* 14, 1867.

SIR: By order of the directory, I have the honor to inform you that by an order of the board of directors of the Cairo & Fulton R. R. Company of Mo., dated April 11, — fill the vacancy occasioned by the decease of John Moore, an original trustee, and, furthermore, to inform you that he has duly signified his acceptance of the appointment.

Mr. Bedford desires me to say to you that he will be in Springfield to see you soon after the 20th inst.

I am, very respectfully, your obedient servant,

T. W. JOHNSON,
102 *Secretary C. & F. R. R. of Mo.*

Hon. M. Brayman, president of board of land trustees of the C. & F. R. R. Co. of Mo., of Springfield, Mo.

Q. Was he at that time secretary of the railroad company?
A. Yes, sir.
Q. I will present to you a transcript of the books of the Cairo & Fulton R. R. Co., which I will ask you to read (handing paper to witness).
A. (Reading:)

"Office Cairo & Fulton R. R. Co. of Mo.

BLOOMFIELD, Mo., *April* 11, 1867.

Ordered by the board of directors that whereas notification has been received from the board of land trustees of the Cairo & Fulton Railroad Company of Mo. that the vacancy existing in said board of trustees, occasioned by the decease of Albert G. Waterman, an original trustee, has been filled by the appointment of

Mason Brayman in manner provided in deed of trust; and, furthermore, that another vacancy exists, caused by the decease of John Moore, an original trustee, which vacancy is to be filled by this board as provided in said deed of trust: it is therefore ordered that Henry H. Bedford be, and is hereby, appointed land trustee of the Cairo & Fulton R. R. Co. of Mo., to fill the vacancy occasioned by the decease of John Moore, an original trustee.

(Signed) GREEN L. POPLIN,
President C. & F. R. R. Co. of Mo.

(Signed) T. W. JOHNSON, *Secretary.*

A true copy from the record of the C. & F. R. R. Co. of Mo.
[SEAL.] T. W. JOHNSON, *Sec.*"

Q. Is that the seal of the Cairo & Fulton Railroad Company?
A. Yes, sir.
Q. Do you know that to be in the handwriting of Mr. Johnson?
A. Of Thomas W. Johnson, who was acting as secretary; yes, sir.

103 The paper referred to is marked Exhibit C and is as follows:

"Office Cairo & Fulton Railroad Co. of Mo.

BLOOMFIELD, Mo., *April* 11, 1867.

Ordered by the board of directors that whereas notification has been received from the board of land trustees of the Cairo & Fulton Railroad Company of Missouri that the vacancy existing in said board of trustees, occasioned by the decease of Albert G. Waterman, an original trustee, has been filled by the appointment of Mason Brayman, in manner provided in deed of trust, and, furthermore, that another vacancy exists, caused by the decease of John Moore, an original trustee, which vacancy is to be filled by this board, as provided in said deed of trust: it is therefore ordered that Henry H. Bedford be, and is hereby, appointed land trustee of the Cairo & Fulton Railroad Co. of Missouri to fill the vacancy occasioned by the decease of John Moore, an original trustee.

(Signed) GREEN L. POPLIN,
Pres't C. & F. R. R. Co. of Mo.
(Signed) T. W. JOHNSON, *Sec.*

Copy from the record of the C. & F. R. R. Co. of Mo.
T. W. JOHNSON, *Sec.*"

Q. What is the instrument that I now show you (handing witness another paper)?
A. This is a deed.
Q. Made by whom?
A. Made in the usual form that was made by the original trustees of the Cairo & Fulton R. R. Co., and this one is signed "M. Brayman, John Wilson, H. H. Bedford;" the two upper signatures are

M. Brayman's and Mr. Wilson's, and the lower one, H. H. Bedford, is my signature.

Q. Is that a deed made by you as land trustees of the Cairo & Fulton R. R. Co. under the mortgage of May 23, 1857?

A. It is; yes, sir.

Q. You did, then, in fact act as trustee?

A. Yes, sir.

104 Q. As one of the original board of land trustees, consisting of three members?

A. Yes, sir.

Q. You don't know, in fact, to whom that deed was made, do you?

A. No, sir; I do not.

Q. When that deed was made by you, executed by you, was it a conveyance in due form to a grantee of that property?

A. That is my recollection of it.

Q. Has it been mutilated since you have signed it or not?

A. When I signed it, it had none of that mutilation on it; it was a deed, when I signed it, conveying that amount of land to somebody.

The paper referred to is marked Exhibit D.

Q. Do you or not know whether John Wilson is alive now?

A. I don't know whether John Wilson is living or dead.

Q. In the year 1869, and on the second day of July, do you remember to have been in the circuit court of Butler county? I call your attention to the fact that a decree was entered in the case of Butler County against The Cairo & Fulton Railroad Company and others divesting the title of the Cairo & Fulton Railroad Company out of lands conveyed by Butler county to the Cairo & Fulton Railroad Company in satisfaction of the county's subscription to the stock of that road, and also divesting the title of the trustees in the mortgage executed May 23rd, 1857, by the Cairo & Fulton Railroad Company.

A. I don't remember whether I was present at the time the decree was promulgated or not. I was *at* present at the time that suit was tried.

Q. Or called for trial?

A. Or called for trial.

Q. Will you state what you did?

A. The proceeding in the court I regard as all wrong, and I got up and stated to the court——

Q. In what capacity?

A. As an *amicus curiæ*—that the Cairo & Fulton Railroad Company was not there, that it was disorganized; that there was nobody there as the Cairo & Fulton Railroad Company to appear, and the board of trustees had not, any of them, been notified of the existence
105 of that suit, and hence any proceeding of that character was null and void.

Mr. Kitchen, of defendants' counsel, states that he objects to this testimony.

Q. Did you in fact appear as attorney for any of those parties?

A. I did not, sir.

Q. Were you a party defendant at the time, in 1868? You remained as trustee to this time, from April 11th, 1867, I believe?

A. I was not one of the parties, or on record as a party, to the suit at the time.

Q. You protested in open court, as an *amicus curiæ*, against the entry of that decree?

A. Yes, sir.

Q. Do you know, in 1866, who were the officers and directors of the Cairo & Fulton R. R. Co.?

A. I don't know that I could be positive about who they were in 1866. I think Johnson and Nohl and Webber and Ringer and Montgomery probably were the directory—five of them—and I think Poplin was acting president.

Q. At that time?

A. At that time.

Q. Do you know who in 1869 were the directors of the Cairo & Fulton R. R. Co.?

A. I don't recollect that there was anybody acting at that time if there was I did not know it.

Cross-examination by Mr. PRIEST:

Q. In what capacity and by virtue of what right did you appear in court and make the protest?

A. Simply because I was interested. I had been interested in the company all the time. I was trustee and stockholder.

Q. And you appeared and protested then as a trustee?

A. No, sir; I did not; I appeared and protested as an individual.

Q. Did you make known to the court in what capacity you protested?

A. Only as I stated; I appeared there as *amicus curiæ* in the court and called his attention to the fact that there had been no notice given to the opposite party.

Q. To what opposite party had there been no notice?

A. To the Cairo & Fulton R. R. Company or to the trustees.

Q. You then protested as trustee that you were not brought
106 into court?

A. No, sir; I did not protest as trustee at all. I simply protested as an individual.

Q. That was the object of your protest; you challenged it because the trustees were not properly served?

A. No, sir; my challenge was simply to call the attention of the court to the fact that there was no notice.

Q. That was the only capacity you appeared in, to simply give that notice, that neither the railroad company nor the trustees had been properly brought into court?

A. That was all, sir.

Q. Did you file an answer in the case?

A. No, sir; I did not.

Q. Didn't you appear and file an answer on behalf of the Cairo and Fulton R. R. Company?

A. I did not.

Q. Did anybody else file an answer for you?

A. If they did I don't remember it.

Mr. KITCHEN:

Q. Judge Owen was there?

The WITNESS: Judge Owen and myself were in practice at that time.

By Mr. PRIEST: Did you ever talk with Judge Owen in regard to the matter?

A. Yes, sir.

Q. About the suit?

A. Yes, sir.

Q. Did you know that he was appearing there in the suit?

A. No, sir.

Q. You had your law office together at that time?

A. Yes, sir.

Q. And discussed the suit with him?

A. Yes, sir; we talked about the facts in the case frequently.

Q. How long is it since you examined the record in that case?

A. I don't think I ever examined it, sir.

Q. You never appeared in court except to enter that protest?

A. No, sir.

Q. Was Judge Owen present at the time you made that pro-
107 test?

A. I don't remember whether he was or not, sir. He and I always attended that circuit court, but it frequently happened that but one of us was there. Whether he was present at that time or not I cannot now decide. I don't recollect on that point.

Q. Do you remember Mr. Stephen M. Chapman?

A. I remember Stephen M. Chapman; yes, sir.

Q. Do you remember whether he had anything to do with that case in that court or not?

A. I don't think he did. If he did I didn't know it.

Q. Do you remember of an order being served upon you in that case to produce certain pleadings and papers?

A. No, sir.

Q. To refresh your memory, wasn't an order made on May 4th, 1871, upon yourself, John W. Emerson, Stephen M. Chapman, and Ire E. Leonard to deliver to the clerk of the Butler county circuit court, on or before the second day of the next term thereof, such of the pleadings in the case, if any, as may be in your possession or custody or control?

A. I don't remember to have seen or heard of it before.

Q. Did you endorse upon that paper, under your own signature, an acknowledgment of the due service of that order on May 6th, 1871?

A. I say if such a thing took place I have forgotten it. It might have been so. I would not undertake to say positively it was not

so, but I don't recollect it now. It was not so, but I don't recollect it now.

Q. Then you may have taken some decisive action in that case other than what you have heretofore stated?

A. Such a thing might be possible, but I have no recollection of any such thing.

Q. That occurred over 20 years age, didn't it?

A. Yes, sir.

Q. You say you know that Butler county subscribed to the capital stock?

A. Yes, sir.

Q. You have no personal knowledge of that fact, have you?

A. Yes, sir.

Q. Were you present when that subscription was made?

108 A. No, sir; but I have seen the document itself and have talked with the officers in reference to it.

Q. That is the information which you have?

A. Yes, sir.

Q. Were you a member of the board of trustees when the certificate for the stock was issued to Butler county?

A. I think I was; yes, sir.

Q. The board of directors, I mean.

A. One of the directory of the Cairo and Fulton Railroad Company.

Q. Who issued the certificate?

A. It was issued under the order of the board of trustees; they were generally issued by the secretary of the company. The certificate of stock was issued by the secretary under the order of the board.

Q. Did you ever see that certificate?

A. Yes, sir.

Q. Were you present when it was issued by the secretary of the company?

A. I think I was, sir.

Q. Were you present when the board made an order to issue it?

A. Yes, sir; I remember of the company making an order to have the certificates made out for the different counties in southeast Missouri.

Q. Was it made in more than one certificate?

A. Yes, sir; it was made in two.

Q. How many in each?

A. 50,000.

Q. Were they dated on the same date?

A. No, sir.

Q. What were the respective dates of them?

A. I can't answer that; I don't remember.

Q. To whom were they delivered?

A. I don't know to whom they were delivered.

Q. Did you have any personal knowledge that they were delivered to any of the proper officers?

A. All the knowledge I have is that the certificate was in the files of the Cairo and Fulton R. R. Co.

Q. That is all?

A. Yes, sir.

Q. The only knowledge you have about it was the appearance of the certificate in the files of the Cairo and Fulton Railroad
109 Company?

A. Yes, sir.

Q. You never saw it in the possession of any officer of the county, did you?

A. Not Butler county.

Q. You did not?

A. I don't think I ever did; I don't remember that I ever did.

Q. You don't know that the county ever appeared at any stockholders' meeting?

A. I know it appeared by its agents; I know parties appeared.

Q. In what capacity and on what occasion did they appear?

A. On elections, when the officers of the board were to be elected.

Q. When was that?

A. Without looking into the record I could not state any time.

Q. Have you any distinct and positive recollection that they appeared on any single occasion, and, if so, upon what occasion?

A. I have a distant recollection that Jennings, who was appointed their agent to vote said stock, appeared at one or two or more elections.

Q. What elections were they—in what years?

A. That is what I say, I don't recollect what the years were, for I have not for a number of years charged my mind with the dates on which these elections were held.

Q. How frequently were the elections held?

A. Annually.

Q. At what point?

A. At the town of Bloomfield, in Stoddard Co., Mo.

Q. Mr. Jennings is the only one whom you remember to have purported to represent at the annual election the county of Butler, is he?

A. I think he is.

Q. Did he present an order of the county court authorizing him to appear and vote the stock?

A. He had a certificate in his possession under the order of the county court, under the seal of the court, purporting to appoint him the agent for and on behalf of the county of Butler to vote the stock subscribed by that county to the capital stock of the Cairo and Fulton Railroad Company.

110 Q. And it was by virtue of that authority contained in such certificate that he did make the vote?

A. Yes, sir.

Q. When was the last election for a board of directors of the Cairo & Fulton R. R. Co. held prior to the war?

A. I think it was in 1860.

Q. What time in 1860?

A. I am not able to state the time. I don't have any distinct recollection about that now. I think we were in the habit of holding elections in the spring, but what month in the spring I don't remember; but that is my recollection now, that the elections were held in the spring of the year.

Q. The spring of 1860?

A. Yes, sir.

Q. At that election you were chosen one of the board of directors?

A. Yes, sir; I think I was.

Q. And when was the next meeting of the board of directors convened?

A. Well, the board of directors had meetings to transact any business that might be necessary. Under the by-laws the president could convene the board for any special occasion that he might need the services of the directory, and whether there was any during the year 1861, after the holding during the year 1860—after the holding of that election or not—I have no distinct recollection now. I would not undertake to say.

Q. Were there not several meetings of the board between the election in 1860 and 1864?

A. Yes, sir; I think there were.

Q. So that the board of directors continued to exercise a supervision during all that time—the board was elected in 1860—over the property of the Cairo & Fulton Railroad Company?

A. Yes, sir; to a greater or less extent.

Q. The property was not abandoned?

A. Not entirely—that is, the organization was not abandoned entirely. There were no regular meetings kept up at all.

Q. A watch was kept over the property. It was thought inadvisable during the period intervening between 1860 and 1864 to prosecute actively the work of the railroad company because of the war?

A. There was nothing done during that time.

111 Q. You could not do it because of the going on of the war?

A. It was entirely abandoned.

Q. The property was not abandoned, was it?

A. As far as I know, it was; nothing could be done with it. The iron was abandoned, a great deal of it next to Cairo went into the river, the cars fell off and went into the river, and the engines that were on the track were taken and run out of the stalls where they were when the war first came up and were destroyed to a large extent.

Q. By whom were they destroyed?

A. They were taken out of the stalls, where they were put up by the company, and one of them was left in the streets of Charleston, and they were destroyed. I don't know by whom; anybody and everybody, I suppose, that wanted to.

Q. Do you know what became of them?

A. At the close of the war they were taken, I believe—brought here to St. Louis—I don't know where.

Q. By whom were they taken?

A. They were taken by the purchasers under the sale that was made there in Charleston soon after the war.

Q. So that the company had a great deal of property when the war broke out, but the railroad was incomplete; it was simply in process of construction?

A. Yes, sir.

Q. Now, the charter and the property that had been acquired by the company were not abandoned, were they?

A. Of course there was no abandonment, but nothing was done with it.

Q. You mean because of the intervention of the war it was impracticable to prosecute the work of constructing the road?

A. Yes, sir; or to do anything else.

Q. But the property itself was not given up or surrendered?

A. I suppose anybody that felt any interest in it felt the same interest that they felt at any other time if it had been in condition that they could have done anything with it.

Q. You could not get money to prosecute the work?

A. No, sir.

112 Q. And couldn't get men to do the work?

A. No, sir.

Q. And so it was impracticable to prosecute it, but the property was not surrendered or abandoned?

A. The company, I suppose, regarded themselves as the owners of the property all the while and were ready at any time if they could have done anything that they could to prosecute the work.

Q. After the close of the war the board of directors got together, did they, and had an annual meeting of the stockholders for the election of directors?

A. Yes, sir.

Q. What year was that first annual meeting after the war held?

A. I think there was an election held in 1864.

Q. So that in 1864 an election was held?

A. Yes, sir.

Q. Were you re-elected one of the board of directors in 1864?

A. I was not, sir.

Q. Do you remember who was?

A. I gave the names awhile ago. I think that election was at the time that Nohl, Johnson, Ringler, Montgomery, and Poplin were elected. I think there were five of them.

Q. Who called that annual meeting at which these men were elected in 1864?

A. Who called it?

Q. Yes, sir.

A. I think Mr. Poplin, exercising the functions of president from the time he had been elected, in 1861, gave the notice.

Q. And held the election?

A. And held the election.

Q. Was there not another election held in 1865?

A. I think so. I think there was one in 1865 and one in 1866.

Q. So that they continued after that to hold annual elections?
A. Yes, sir.
Q. And another one was held in 1867?
A. Yes, sir.
Q. In April, 1867?
A. In April, 1867, I think there was an election held.
Q. And then there was another held, an annual election, in 1868, was there not?
A. I don't remember.
Q. Eh?
113 A. No, sir; I don't think there was any after 1867; if there was any held after 1867, I don't recollect it. I think 1867 was the last meeting that was held.
Q. An annual meeting of the stockholders was held in 1867 and these officers were chosen?
A. Yes, sir.
Q. Who were the officers chosen in 1867?
A. I don't know that I can answer that question, because I don't remember that there was sufficient attention paid as to who were made officers of the company, as most of the parties interested in the Cairo & Fulton R. R. Co. were rebels and were not permitted to hold office, and, as a matter of course, there was some one selected that was as little objectionable to the Southern feeling there as we could get up, and just who they were I cannot answer, but I think Johnson, Poplin, Montgomery, and Ringer or Weber; there was Weber there sometimes.

By Mr. LIONBERGER:

Q. Whitcomb?
A. Whitcomb was not elected, but I think Simmons was.

By Mr. KITCHEN:

Q. Krum was elected, was he not?
A. Yes, sir; Krum part of the time and Dr. Simmons, of Charleston.
Q. Simpson?
A. Yes, sir; Simpson, not Simmons.

By Mr. PRIEST:

Q. Was Mason Brayman a member of the board of directors of the Cairo & Fulton R. R. Co. after 1864?
A. No, sir.
Q. When was he chosen president of the Cairo & Fulton R. R. Co. last before the war?
A. He never was selected but one time that I know of. He was chosen president and acted—continued to act as president up until, I reckon it was, in 1860. I believe it was in 1860 he resigned.
Q. So that he was never connected with the board of directors of the Cairo & Fulton R. R. Co. after 1860?
A. I think not.

Q. Did you know John Wilson? Did you know him personally?
A. No, sir.
Q. Did you ever see him write?
A. No, sir.
Q. Do you know whether he is living now or not?
A. I do not.

114 Redirect examination by Mr. LIONBERGER:

Q. You knew John Wilson personally, didn't you?
A. I never saw John Wilson.
Q. At the time of the execution of this deed were you together or not?
A. No, sir; John Wilson was not present.
Q. After the abandonment for the purpose of business of the road in 1861, the Cairo & Fulton railroad in 1861, was the reconstruction of it ever resumed by the directors of the road, to your knowledge?
A. No, sir; there was never anything done on it afterwards.
Q. Were you ever a partner of Chapman & Owens?
A. I was a partner of Owens. Chapman never had anything to do with the partnership.
Q. You referred to the discussing of the matter in court. Had you ever discussed it before in court?
A. No, sir.
Q. Did you ever hear Mr. Owens say he had any connection with the case and that it was an outrage and a fraud?
A. I don't know that I heard him say so, but he and I talked about it.

Mr. Kitchen, of defendants' counsel, objects to this testimony as hearsay.

Q. You talked about the certificates of stock issued to Butler county having been on file with the Cairo & Fulton Railroad Company. What do you mean by that?
A. I mean that it was like any of the rest of the stock. Whenever stock was taken in the Cairo & Fulton Railroad Company the certificate itself was filed there and a book made—a record of the fact—but then we had no certificates.
Q. How do you mean—the certificates were made and were there?
A. Yes, sir; they were filed there.
Q. You saw them before delivery. Is that what you mean?
A. Yes, sir; the certificates were there, made out.
Q. Did you ever see the name of Butler county on the list of stockholders of the Cairo & Fulton R. R. Co.?
A. Yes, sir.

115 During the reading of the deposition, at the question, "Do you know whether or not Butler county authorized agents to vote upon that stock and exercise the usual rights of ownership?"

counsel for Butler county said, "That cannot estop Butler county in this proceeding. In the first place, they cannot prove that Butler county voted in that way; if they did, that does not estop them. It is not the best evidence, and the county anyhow was not estopped in these swamp-land deeds." Our objection was overruled by the court; to which action of the court said counsel objected and excepted at the time, and the whole deposition from this point went in over the continued objection of defendants' counsel. Defendants' counsel excepted at the time.

Plaintiffs counsel offered in evidence the exhibits attached to the deposition just read, calling attention to a deed dated January, 1868, to show that Bedford acted in conjunction with the other trustees, the deed being signed by Bedford, Wilson, and Brayman.

Plaintiffs' offered in evidence order No. 6, from page 97 of the record of the board of trustees of the Cairo & Fulton R. R. in Mo., being the official record of the deed of appointment already read:

Office of the board of trustees of the Cairo & Fulton Railroad in Missouri.

SPRINGFIELD, ILL., *April* 20, 1867.

On receipt of an official communication from F. W. Johnson, secretary of the Cairo & Fulton R. R. in Missouri, enclosing an order from the board of directors of said company in words and figures following, to wit:

BLOOMFIELD, MO., *April* 11, 1867.

Ordered by the board of directors that whereas notification has been received from the board of land trustees of the Cairo & Fulton R. R. Co. in Missouri that the vacancy existing in said board of trustees occasioned by the death of Albert G. Waterman, an original trustee, has been filled by the appointment of Mason Brayman in the manner provided in the deed of trust, and
116 furthermore that another vacancy exists because of the decease of John Moore, as original trustee, which vacancy is to be filled by this board, as provided in said deed of trust, it is therefore ordered that Henry H. Bedford is hereby appointed land trustee of the Cairo & Fulton R. R. Co. of Missouri to fill the vacancy occasioned by the death of John Moore, an original trustee.

(Signed) GREEN L. POPLIN,
President of the C. & F. R. R. of Mo.

T. W. JOHNSON, *Secretary.*

Now it is ordered that said order of appointment be here recorded and the said Henry H. Bedford recognized as a member of this board, with all the powers and duties of an original trustee as provided by the deed of trust dated May 23, 1857.

(Signed) M. BRAYMAN, *President.*

CHARLES P. CHOUTEAU, witness for plaintiff, testified that he lived in St. Louis, and that he had been acquainted with Brayman & Wilson; that he sold a large portion of the land to Oxley Stave

Co.; that he made every possible effort to recover the record of the Cairo & Fulton R. R. Co.; applied to Brayman and others and to the executor of the will of Thomas Allen, who purchased the road from the State. There was a suit for many years between Mr. Allen and himself, and he procured the books of the company, and after the decree had been pronounced against him he turned the books over to witness. He had not been able to find the records of the Cairo & Fulton R. R. They were not among the books and papers turned over by Mr. Allen.

Cross-examined by Mr. GROVES:

Wilson died some time in the early 70's; think he was alive in 1866.

Q. Do you remember hearing anything about a decree having been rendered in the circuit court of Butler Co. about 1869, commenced in 1866?

A. No, sir; I do not.

117 Q. Do you remember of suit being brought there in 1868 or about that time or 1870 by the Cairo & Fulton R. R. against yourself and others?

A. I have no such recollection. Everything was left in the hands of my attorneys.

Q. In 1870 and 1871 who were your attorneys in St. Louis?

A. Sam'l T. Glover and Mr. Shepley, his partner.

Q. Have you no recollection of employing them to make answer to a suit brought by the Cairo & Fulton R. R. Co. against you, Brayman, Wilson, and Bedford?

A. I cannot say that I do recollect it, yet it might be; but I never occupied myself with anything of the kind; left it entirely in the hands of my attorneys.

Q. Do you know one William Russell, who lives here?

A. I never knew him.

Q. Do you know Mr. Taylor, the sheriff in 1870 and 1871?

A. What was his first name?

Q. Phillip C. Did not he serve a summons on you on the 5th day of January, 1871, in the case of Cairo & Fulton R. R. Co. against yourself and those other parties that I have named?

A. It may be, but I have no recollection of it.

(Witness is shown answer filed in that case.)

A. I see that is the writing, and the signatures here are by Samuel T. Glover, but I must confess that I do not recollect anything at all about him, because I never bothered myself about any of those suits. When they served notices, summons, or anything of that sort I at once handed it to Mr. Glover.

Q. Did not some one have to show Mr. Glover the facts of litigation about which you employed him?

A. I suppose so, sir.

Q. Who did that?

A. In fact, I do not know.

Q. Did you not always do it?

A. No, sir; I did not; sometimes I did, when questions were asked me.

Q. Who had charge of the facts in your case?

A. Samuel T. Glover and Mr. Shepley.

118 Q. (Showing another paper.) Mr. Russell, as deputy sheriff under Phillip C. Taylor, certifies that he served you. Can you call to mind that fact or not?

A. No, sir; I do not recollect the fact to my mind, but he may have done it.

Plaintiff- then offered a certified copy of an order of the county court of Butler, Mo., — the 11th day of April, 1866, as follows:

STATE OF MISSOURI, } ss:
County of Butler, }

April Term, 1866.

In the county court of said county, on the 11th day of April, 1866, the following, among other, proceedings *was* had:

It is ordered by the court that Joseph W. Baldwin be, and is hereby, appointed agent of the county of Butler for the following and no other purposes, to wit, to represent the interests of said county in the Cairo and Fulton R. R. and to transact the business of said county with said company; and it is further ordered by the court that Daniel L. Jennings, late agent for the purpose aforesaid, deliver to Joseph W. Baldwin the books, papers, certificates of stock, and everything else in his possession or under his control relating to said agency of the interests of said county of Butler in the Cairo & Fulton Railroad Company.

Plaintiff- then offered in evidence a further order of the same court of the 19th of December, 1866, as follows:

STATE OF MISSOURI, } ss:
County of Butler, }

October Adjourned Term, 1866.

In the county court of said county, on the 19th day of December, 1866, the following, among other, proceedings were had:

Whereas Joseph W. Baldwin, of this county, has resigned his appointment to act for the county of Butler in representing its interests in the Cairo & Fulton R. R. Company of Missouri, it is therefore ordered by the court that John W. Emerson, of Ironton, Mo., be appointed the agent of the county of Butler to represent
119 the interests of said county and to transact the business of said county in and with the Cairo & Fulton R. R. Company, and that said Joseph W. Baldwin deliver to John W. Emerson all books, papers, and certificates of stock relating to the interests of said county in said railroad company.

Plaintiff- then offered a further order of the county court of Butler county dated June 6th, 1870, as follows:

STATE OF MISSOURI, } ss:
County of Butler, }

May Adjourned Term, 1870.

In the county court of said county, on the 6th day of June, 1870, the following, among other, proceedings were had, to wit:

It is ordered by the court that John W. Emerson, Esq., file with the clerk of this court forthwith the certificate of stock of this county in the Cairo & Fulton Railroad Company, and that his agency on behalf of this county to represent their (?) interests in said railroad company be, and the same is hereby, revoked and held for naught.

Plaintiffs then offered in evidence deposition of GEORGE H. CRUMB, to wit:

Q. State your name, occupation, and place of residence.

A. George H. Crumb; attorney-at-law; Poplar Bluff, Mo.

Q. Are you acquainted with the plaintiff and defendant in this case?

A. Yes; with some of the defendants; not all.

Q. What official position, if any, did you hold about the year 1869?

A. I don't recollect particularly. I was county attorney of Stoddard county about that time, but not in 1869.

Q. I will ask you, Mr. Crumb, whether you were acquainted with the officers, president, secretary, and directors, of the old Cairo & Fulton R. R. Co. along about 1866 to 1870.

A. I was acquainted with the majority of the persons who
120 acted as such—C. B. Crumb, president and vice-president, directors, etc.

Q. Were you acquainted along about that time with Henry F. Bedford; and, if so, was he in any way connected with the Cairo & Fulton R. R.?

A. I have been acquainted with Bedford since 1860; from 1860 to 1870. He was always connected with the railroad, I think, as he always acted for it in some capacity or seemed to be acting in some capacity, either as attorney or director of the Cairo & Fulton R. R.

Q. Do you remember about the time of the trial of the case of Butler County *v.* The Cairo & Fulton R. R. Co. and others somewhere about the year 1869?

A. I recollect the calling of that case for trial in the circuit court of Butler Co., and the introduction of a part of the testimony, but can't give the exact date.

Q. Were you present in court at the time the case was called for trial?

A. I was.

Q. Was Henry H. Bedford there?

A. He was there at the time or came in immediately afterwards.

Q. If Mr. Bedford was present at that time and made any statement to the court as to whether the case should or should not be proceeded with, you may state what he said and done at the time as nearly as you can remember.

DEFENDANTS' COUNSEL: In behalf of the St. Louis, Iron M. & S. R'y Co. I, as counsel, object to that question as irrelevant to the issues in this case, as incompetent to affect such railroad company, and because neither *of* such railroad company nor any of the other defendants are bound by any statements or declarations made by Mr. Bedford, because it does not seek to elicit the best evidence of which the case is susceptible.

A. Immediately after the case was called a question arose as to whether the parties defendant were in court or had been summoned, Mr. Bedford raising the objection that the trustee for the railroad company and the officers of the Cairo & Fulton R. R. Co. of Missouri had not been duly summoned and were not represented; that some of the parties were dead. He appeared to be considerably
121 excited, and the matter was discussed rather warmly. The plaintiff was represented by John W. Emerson, attorney, who claimed that the parties were all in court or had been duly summoned. This Mr. Bedford vehemently denied. I recollect also that some statement was made to the effect by Mr. Emerson that Mr. Bedford was appearing in court in the matter. This Mr. Bedford denied, and my recollection is that he stated he appeared as a friend of the court (as *amicus curiæ*), but he protested against any action by the court in the case because, as he claimed, the necessary parties defendant had not been duly summoned and were not represented. I have no recollection of noticing any further proceedings in the case.

Counsel for defendant the railway company objects to the above answer of witness because it is incompetent, in that neither the last-named defendant nor any other defendant in the case can be bound by statements made by Mr. Bedford, and because the record of the court alone is the proper evidence of what took place in said court.

Same objections on the part of Butler county.

Q. State whether or not Mr. Bedford appeared and took any part in the trial of said cause further than as you have stated.

A. At the time — which I refer Mr. Bedford stated that he did not appear, and my recollection is that he walked out of the court-room immediately after he made such statement, but I am not positive of that; he was outside of the bar, anywhere.

Same objections as last above.

Q. I will ask you, Mr. Crumb, whether either Mr. Stephen M. Chapman or Reuben B. Owens were present in the court-room at the time to which you refer, if you remember.

A. To the best of my recollection, Mr. Chapman was present; as

to whether Mr. Owens was present I could not say. Mr. Owen and Bedford were partners at the time.

Q. Do you remember whether Mr. Chapman took any part in the trial in said cause?

122 Same objection on the part of the railroad company and Butler county.

A. I have no recollection of Mr. Chapman saying a word. I think his name — mentioned in some way, but I have no recollection of his saying a word.

Cross-examination:

Q. What year was that, or what month?
A. I could not give you the year or the month.
Q. It was when James H. Vail was judge of the circuit?
A. It was.
Q. About how many years has it been since this occurrence in the court?
A. It is over 20 years, but I cannot recollect positively.
Q. You were not in the case?
A. I was not in the case.
Q. You do not know whether the case was tried at the time or on the day when, as you have stated, you heard it called for trial in the circuit court?
A. I do not know that the trial was completed then; did not give any attention to the trial subsequently.
Q. It is not your recollection that immediately after the statement which you say Bedford made the court took a recess or adjourned?
A. My recollection is that immediately after this discussion ended a recess was taken, and I have no further recollection in connection with the trial of the case.
Q. You were not present at the trial of the case? You were not present at any other time when this case was called for trial?
A. I have no recollection of being present at any other time.

Plaintiff then offered deed of Butler county to John W. Emerson, dated August 3, 1869, conveying 1,398 acres of swamp land; also deed from Butler county to John W. Emerson of same date,
123 conveying 1,103.95 acres of swamp land; deed of Butler county to Ira E. Leonard, August 3, 1869, for —— number of acres; deed by the county of Butler to Sarah M. Emerson for —— number of acres of swamp land; deed from the county of Butler to George F. Emerson of same date for 2,886 acres of swamp land.

Deed from Butler county to the same, same date, for 3,440 acres of swamp land.

Deed from same to same, same date, 3,581 acres.

Deed from Butler county of the same date conveying 1,847.10 acres of swamp land.

Deed from Butler county to —— ——, conveying 4,561 acres of swamp land.

Deed from Butler county to —— ——, conveying —— acres of swamp land.

Aggregating 27,949.70 acres.

Plaintiff- then offered in evidence the order of Butler county court, and counsel for defendants objected to the order of Butler county court on the ground that it had no right to pass upon the question of fraud; that if the county had made deeds that were fraudulently obtained and wanted to do anything, they could only issue a patent to somebody else, but the county court had no power to pass upon the question; but defendants' objections were overruled, and to the action of the court in overruling them defendants excepted at the time. Said order is as follows:

"Whereas it appears to the satisfaction of the court that John W. Emerson, Sarah M. Emerson, George W. Emerson, Ire E. Leonard, John Snoddy, and John W. Baldwin, by false and fr*uau*lent pretenses and misrepresentations, have obtained of the commissioner of patents of this county, contrary to the order of this court, patents bearing date August 3d, 1869, for certain lands in said patents described, it is therefore ordered by the court that the persons aforesaid deliver said patents forthwith to George W. Ady, commissioner of patents of this county.

Plaintiffs offered in evidence act of the legislature of Mis-
124 souri of Dec. 11, 1855, found in Session Acts of 1855, page 468, for the purpose of explaining the sell-out act of 1866, under which the property of the Cairo & Fulton R. R. Co. was sold.

Plaintiffs offered in evidence an act of the legislature of Missouri of March 3, 1857, amending the act of December 10, 1855, found in Session Acts 1856–'7, page 90, reading section 20.

Plaintiffs offered in evidence an act of the legislature of Missouri approved Feb. 27, 1857, as found in Session Acts '56 and '57, page 257, reading section 6.

Plaintiff- here rests.

Defendants, to sustain the issues on their parts, offered evidence as follows:

Defendants' Evidence.

Defendants offered in evidence act of the legislature of Missouri approved Feb. 23, 1851, page 232; also act of the legislature approved February 28th, 1855, as found in Session Acts for 1854 and '5, page 160; also act of the legislature of Missouri approved March 3, 1855, on the same page as above, 160; also act of the legislature of Missouri approved March 3, 1855, as found on the same page, 160.

Mr. Groves, counsel for some of defendants, offered in evidence the papers in case brought in the circuit court of Butler county in 1871, to wit, the case of Cairo & Fulton R. R. *v.* Butler Co., John W. Emerson, George Emerson, Stephen Chapman, Wm. Fairchild, and others, and states that this decree sets forth the fact that the decree was o b

tained through fraud. Service was had in the case. There was an appearance and a final determination of the case; that he offered this for the purpose of showing that the same matters that are now offered in evidence as showing fraud in obtaining the decree at the suit of Butler county have once been passed upon by the court.

125 It alleges fraud on the part of Emerson, Chapman, and all those defendants in obtaining that decree. The same matters they are now alleging and charging were alleged and charged in this suit.

Mr. WARRENTON: What is the final determination? What does the decree say?

Mr. LIONBERGER: Our objection to it is *is* first on the ground that the case was begun in 1871, while our title relates back to 1857, and we were not parties in any way to that suit.

Mr. GROVES (referring to papers offered): It was disposed of on motion, as will appear from this record, in the circuit court of Butler county, Mo.:

"Be it remembered that on the 5th day of September, 1874, on the 4th day of the November term, the following order was entered on record in said court, to wit:

CAIRO & FULTON R. R. OF MISSOURI
vs.
BUTLER COUNTY, JOHN W. EMERSON, and Others.

Now somes the defendant-, by their attorney, and the plaintiff, being called, comes not; whereupon this case is submitted to the court upon the motion of defendants to dismiss this suit, and, it having been heard, it is ordered by the court that said motion be sustained and said suit dismissed, and that said defendants go hence without day and have and recover their costs and have therefor execution."

The COURT: Do I understand that record is offered?

Mr. GROVES: That record is offered.

Mr. LIONBERGER: I object to it on the grounds, in the first place, it is not a judgment of any court of record. In the second place, if it is a record, it is between other parties and does not conclude us.

The COURT: What do you claim for that record?

Mr. PHILLIPS: It is a petition for review to set aside a

126 judgment rendered in 1869. The Cairo & Fulton R. R. claim it had no notice. After that they came in and filed a bill for review under our statute within three years and then neglected their suit, and finally the circuit court of Butler county dismissed the case, thereby affirming the decree of 1869. When the suit was originally brought they claimed that they had no notice and asked a review of the judgment rendered in the court theretofore. They neglected to prosecute this suit. It was dismissed on motion.

The COURT: It may have some bearing upon whether the Cairo & Fulton R. R. Co. was dissolved at the time of this decree. For that purpose it would be admissible anyhow, and it may go in subject to objection. What was the date of it?

Mr. GROVES: August, 1871. It was dismissed in 1874.

Plaintiffs objected to the action of the court admitting this evidence and excepted to the court's ruling.

Defendants' counsel offered a certified copy of the suit brought by the Cairo & Fulton R. R. Co. of Missouri against John Wilson and M. Brayman, Henry H. Bedford, and Charles P. Chouteau, returnable to the March term, 1871, brought by the company to set aside a trust deed alleged it was obtained by fraud.

Mr. GROVES: This is offered for the purpose of showing that the Cairo & Fulton R. R. long after 1866 was acting, and that these parties all had notice of that old decree, and, further, to show that Mr. Chouteau at that time and his attorneys recognized the existence of the Cairo & Fulton R. R. Co. as a corporation still in existence.

Mr. LIONBERGER: This is not a certified copy of anything. It is a copy of the petition and a return of service against Bedford and nobody else.

The COURT: If the Cairo & Fulton R. R. Co. brought suit at that time. Anyway, I suppose, it had life enough to bring a suit.

Mr. GROVES: I want to offer the answer of Chouteau in that same case, the answer of Brayman, one of the defendants, and the answer of John Wilson, made in 1871, showing that he was not
127 dead at that time. I offer an answer of Brayman filed in 1871.

Plaintiff- objected to the introduction of this testimony on the ground of irrelevancy and incompetency, and their objection was overruled, and to this action of the court they excepted.

Mr. Groves, for defendant-, offered another suit in the Cairo & Fulton R. R., commenced in 1871, filed in Butler county against Thomas Allen, his heirs and assigns, and also against the Iron Mountain R'y Co.

Defendants offered the petition in said last-named case, which was objected to on account of irrelevancy, but admitted by the court; to which action of the court defendants excepted.

Plaintiffs' counsel objected on the ground that the testimony is immaterial and irrelevant and because the petition is not the record in the case.

Defendant-, at the same time, offered the answer for the same purpose. The objection of plaintiffs' counsel was overruled; to which they excepted.

Defendants offered in evidence a contract between the St. Louis, Iron Mountain & Southern R. R. Co. and Butler county, which in substance is as follows:

"The appointment of S. R. Harviell commissioner on the part of Butler county to contract with the St. Louis, Iron Mountain &

Southern Railway Company for the construction of certain pieces of levee and railroad embankment within said county, said work to be paid for in swamp or overflowed lands of county at the rate of $1.25 an acre.

"The report of said commissioner that he had entered into a contract as such for Butler county with the said railway company on the 13th of July, 1870, for the construction of certain levees and embankments within said county, such work to be paid for in the swamp or overflowed lands of the county at $1.25 an acre. Said work to be done by said railroad company is fully and specifically set forth in the written contract so entered into between said
128 Harviell for the county of Butler and said railroad company; said work, according to the terms of the contract, to be completed within three years from the date thereof; which said contract was entered into or authorized, as appears by certified copy of the order of court attached to said contract, which is also offered in evidence by the said county court of Butler county, and accepted and approved by an order of court after the report of said commissioner."

Upon the back of said contract so offered in evidence occurs this indorsement: "The within contract with Butler county, Mo., is approved, accepted, and agreed to by the St. Louis and Iron Mountain R. R. Company, Thomas Allen, president."

Plaintiffs' counsel objected on the ground that the county court is a court of record, and can only speak by its record; that to authorize a contract it must be entered of record.

Defendants offered in evidence certificate showing consolidation — the St. Louis, Iron Mountain R. R. with the St. Louis, Iron Mountain and Southern under the name of the St. Louis, Iron Mountain and Southern Railway Company.

Defendants offered in evidence patent from Butler county to the St. Louis, Iron Mountain & Southern Railway Company, successors to the St. Louis, Iron Mountain R. R. Company, of the lands in controversy, predicated on the contract which has just been offered in evidence; which said patent is dated the 10th day of December, 1874; to which plaintiff objected on the ground that it is signed by a commissioner instead of the governor, that there was no law at that time authorizing a commissioner to be appointed by the county court for the transfer of swamp lands; which objection the court overruled; to which action of the court plaintiffs excepted.

JOHN W. EMERSON, on the part of the defendant-, testified
129 as follows:

Q. What is your profession?

A. Attorney-at-law.

Q. Are you the J. W. Emerson who was the attorney for the plaintiff in the case of Butler County *v.* The Cairo & Fulton R. R. Co., instituted in 1866?

A. I was attorney for Butler county in a suit against the Cairo & Fulton R. R. Co. about that time, 1866 to 1870—along there.

Q. Who, if anybody, was associated with you in the conduct of that case?

A. No one except the county attorneys or the circuit attorneys, as they were at that time, with the different ones, and I had some communications with the attorney general in relation to the matter on behalf of the State. But he did not himself interfere at any time, except on one occasion I took a letter from the attorney general some question was raised as to the authority of the county to employ private counsel to prosecute the suit.

Q. (Interrupting.) We don't care about that.

A. (Witness continuing:) With the exception of that, I was the attorney of the county in the management of the case.

Q. Who was the circuit attorney, do you remember, in 1866 and to 1870?

A. I recollect Judge Leonard; Ira E. Leonard was circuit attorney at that time, before the county attorneys came in.

Q. Do you remember when the case was tried?

A. I can't fix the dates positively, but my best impression upon it is it was about 1869. I think the case was pending for two or three years.

Q. Were you present at the trial of the cause?

A. I was.

Q. And you had charge of the case for the plaintiff?

A. I did.

Q. Do you recollect the facts in the trial, the circumstances?

A. I do, sir.

Q. How long were you engaged in the trial of the case?

A. Well, my best recollection now is probably two hours—two and a half. The case on final hearing was not contested by the opposing counsel, and I introduced the testimony, therefore, in
130 the order in which I had arranged by my memorandum as fast as I could; it was in regular order.

Q. What was the testimony, record or oral testimony?

A. The most of it was record testimony; some was parole testimony—verbal testimony. The only parole testimony that was introduced, so far as I now remember, was one or two gentlemen who had either been members of the county court at the time of the original transaction between the county court and the Cairo & Fulton railroad when that grant was made or persons who were familiar with it. I think it was at the time Ferguson was clerk, and probably Judge Woerner, simply to show there had not been a majority vote authorizing.

Q. (Interrupting.) Had not been what?

A. Had not been an election held in the county. (Interrupting by objection.)

Q. Who was present at the trial of that case, what lawyers that you now recall? I will ask you, Judge, if Henry H. Bedford was present.

A. Yes, sir; that is my recollection.

Q. Was Mr. Chapman, S. M. Chapman?

A. Yes, sir; I think so; that is my recollection.

Q. You say you were some two or three hours in the trial of the case?

A. Yes, sir.

Q. Who, if anybody, represented the defendants?

A. Bedford and Owen and Chapman had been the attorneys defending the case all through from term to term.

Q. It seems that the papers in the case are lost?

A. Yes; I learned that from the officers myself. I tried to get copies of them, *by* could not; it was from the clerk.

Q. Chapman was present, you say?

A. That is my recollection; that he was present.

Q. I will ask you what occurred in the trial of the case. Had any pleadings been filed on the part of the defendant?

A. Yes; at different terms.

Q. What pleadings?

A. Of course, after so long a time—it is over 20 years now.

131 Mr. LIONBERGER: The record recite- all the pleadings that were filed. I contend nothing can be shown outside of the record.

Mr. CLARDY: The record shows on the face that it is incomplete. Some of the papers have been lost; papers, together with parts of the record, are lost.

Mr. LIONBERGER: Efforts were made to supply the record and citations to Judge Emerson himself. If they were not able to make the record good I think it is too late now to do it if they could not do it at that time. I think it too late now to take oral testimony of one of the attorneys in the case.

The COURT: Do you expect to show any other papers than those mentioned in the record?

Mr. CLARDY: I do not know what the record shows. I purpose to show a demurrer was filed.

The COURT: Do you intend to show anythi-g further than what is shown, what appears by the record?

Mr. CLARDY: I don't know whether the record shows it or not, but I propose to show that a demurrer was filed to the petition of the plaintiff on the part of the defendant.

Mr. LIONBERGER: The record shows a demurrer was filed.

The WITNESS: I have a copy of the demurrer, which I can supply.

Mr. CLARDY: You have a copy of that demurrer?

The WITNESS: I have a copy; yes, sir. I made one from the papers at that time.

Mr. CLARDY: The record does not show by whom it was filed; there were several parties to the suit. I propose to show by the witness the parties that filed that demurrer.

Mr. LIONBERGER: We object on the ground that the record ought to have been completed in the proper manner down there. An effort was made to complete the record by the citation of Judge Emerson, among others, but they did not succeed in doing it. They cannot now complete the record in this manner by putting

132 on one of the attorneys at this time to make it good.

Mr. CLARDY: The record introduced by the plaintiff shows

that an order was made by the circuit court of Butler county upon several attorneys connected with that case directing them to produce all papers in court; that each responded that he had no papers in his possession or under his control belonging to the case and knew nothing of them. There was no statutory proceeding for supplying the record, but there was simply an effort made, without authority, I think, on the part of the court—perhaps it might have been with authority—to require counsel who had been connected with that case to produce whatever papers they had in court. Now, I propose to show the nature of this demurrer. It is not, of course, the original demurrer, but is simply a copy.

And the objection of plaintiffs' counsel is overruled by the court.

A. (Witness continuing:) I wish to state to the court and the bar that the first information I had at all in relation to the pendency of this suit was the other day, meeting Mr. Clardy on the street. It had never occurred to me and I had never heard of it; knew nothing about it. Mr. Clardy met me on the street and told me a suit of this kind was pending and he would want me as a witness. Since then I looked up to see what papers I had that would contain any data in relation to the original suit. In doing so I found this memorandum in my own handwriting.

Q. Have you the demurrer there?

A. I have this memorandum, which I remember was made from the papers at the term preceding the final hearing of the case; a copy of several of the papers in the case also, made by myself, and one is a copy of a notice.

The COURT (interrupting): What he asked me was about the demurrer. Have you the demurrer?

The WITNESS: Yes, sir.

The COURT: He says he has the demurrer. What do you want to do with it?

WITNESS (referring to paper): That page seems to contain
133 one of the demurrers. I don't know whether the first one or not. It shows for itself what it is.

Q. (Mr. Clardy continuing:) This, you state, is a copy of the paper filed by Bedford and Owen?

A. Yes, sir; it is a copy of what it purports to be. I have not read it over since I came on the stand. There are two or three memoranda on that same paper.

The COURT: You may read that paper.

Mr. LIONBERGER: We object to that paper. It does not appear it was made from the pleadings or made by himself or how made or when.

The WITNESS: Yes; I made this from the pleadings that were then filed prior to the trial, simply for my own information.

And the paper produced by the witness is read as follows:

COUNTY OF BUTLER, STATE OF MISSOURI, Plaintiff,
vs.
THE CAIRO & FULTON RAILROAD COMPANY, JOHN MOORE, JOHN WILSON, and ALBERT G. WATERMAN, Defendants.

In the county of Butler, at the March term of the circuit court of the said county, A. D. 1867, the defendants come and demur to the plaintiff's petition for the following reasons, *ti* wit:

1. There is a misjoinder of parties herein.

2. There are parties included in this suit who occupy entirely different possessions.

3. The plaintiff states that the governor, pretending to act as the agent for plaintiff, wrongfully and illegally conveyed by deed to said Cairo & Fulton Railroad Company 100,868.56 acres of land, and does not make profert of said deed or make any excuse
134 therefor.

4. Plaintiff states that on the 23rd day of May, 1857, said Cairo and Fulton Railroad Company conveyed said lands to John Moore, John Wilson, and A. G. Waterman without making profert of said conveyance or any excuse therefor.

(Signed) BEDFORD AND OWEN,
Attorneys for the Defendant.

The WITNESS: There is another one filed subsequent to that. I think it is there. I don't know whether it is there or not.

Q. Was Chapman connected with this case?

A. Yes, sir; he was with Bedford and Owens, as I remember.

Q. What did he do, if anything?

A. Possibly he was not at the beginning, but before it was finally terminated.

Q. Well, at the trial did anybody appear for the defendants?

A. The attorneys, Mr. Bedford and Mr. Chapman, as I recollect, were in court—were present. My remembrance now is that Mr. Bedford stated that the railroad company had ceased to have any interest in the matter in controversy, or some reason why he did not propose further to defend the case. They were present, however, and that is about what occurred.

Q. I will ask you if you have any recollection of Henry H. Bedford appearing and suggesting that there had been no service upon defendants, and that the court had no jurisdiction to try the case at the time of the trial of this case.

A. No such remark was made in my hearing. I was present, of course; had charge of the case.

Q. Was this case called up at some term or terms prior to the time when it was tried in 1869?

A. I should think it was every term. I have had controversies about it in regular order, a great many arguments on questions of law connected with it. Every term, so far as I remember, something occurred.

Q. Was Mr. Bedford present at any of those terms of court?

A. Certainly.

135 Q. Do you remember of his making a suggestion of that kind at any time prior to the trial of the case? I will ask you this: If publication was made as to non-resident defendants.

A. Yes, sir.

Q. At some time after the institution of the suit by order of the court?

A. Certainly.

Q. Now, I will ask you what was the ground of making the order for publication as to those non-resident trustees?

Mr. MADILL: I assume this is all subject to the objection of plaintiff.

The COURT: I do not know what that is.

Mr. MADILL: The objection generally made, that it is, as I understand the purpose of the defendant The St. Louis & Iron Mountain R. R. Co., by the oral testimony of this witness to proceed to supply this record. He now asked the ground for publication. The defendant puts a witness on the stand to supply facts to give the court jurisdiction; to supply defects in that record by oral testimony. I know of no way that can be done except in conformity with the statute. If these gentlemen believe that record is imperfect, there is a way to supply it; but that method has been resorted to once and disposed of under the statute, and the result of it appears as a matter of record in this case in that court; and now, instead of taking that record, we are confronted in this trial by an effort to get in the facts necessary to help out this judgment—not the original demurrer in the case, but a memorandum. If it be permitted on the part of the defendant to supply this proof in that way, I would like to save an exception.

Mr. CLARDY: I did not offer it for the purpose of showing whether publication had been made; it was a preliminary question to what would follow. The record offered in evidence on the part of the plaintiff shows order of publication was made, and that the publication was made. I expect to follow it with a question and

136 asked this in order that the witness might know the purpose for which I asked it. I am proposing to show that upon a suggestion made that the court had no jurisdiction in the case, an order was made that notice by publication be given in order that it may appear that the facts testified to by Major Bedford occurred at the term anterior to the term at which this case was tried.

The COURT: I suppose all of this line of testimony goes in, is subject to the line of objection stated by Judge Madill and Mr. Lionberger?

Q. Do you remember any other controversy that occurred at some other term of court prior to that?

A. I think you will find another motion or demurrer there, a copy of one that was filed by Mr. Chapman and Bedford and Owen all together; perhaps at a later term. Of course they were all argued and heard in the ordinary way of proceedings of that kind.

Q. Mr. Bedford stated that he suggested on one occasion—I think at the time the case was tried—that he appealed as *amicus curiæ* and argued the court had no jurisdiction in the case. Do you remember anything of that?

A. I answered before I did not. No such statement was made in my hearing. If you will notice, there is another pleading there, and I might state in explanation that the whole case was proceeding on the theory that it was defended generally by those attorneys, and I at least supposed that they were representing all the defendants in the case and I proceeded to final hearing and worked upon that under*tsna*ding (interrupted as follows:)——

Mr. MADILL (interrupting): That is a statement that ought not to be made by a lawyer on the stand, who happens to be called as a witness. We object.

Q. Do you know anything of this? What is that a copy of?

A. That is not a copy of anything; that is a mere memorandum made as to what that file showed there.

Q. (Referring to paper.) That is a copy signed "Greene L. Poplin."

A. That is a copy of the acknowledgment of service.

137 Q. Where did you get that?

A. I got it from the papers that were before me at the time it was made.

Q. Who was Greene L. Poplin?

A. He was supposed to be, as far as I know, president of the Cairo & Fulton railroad at that time.

Q. President of the board of trustees?

A. That was what I understood, and we proceeded accordingly. Of course I do not know anything save what I would know in an ordinary proceeding against a corporation.

Q. That is a copy of his acknowledgment of service?

A. Yes; excuse me, some suggestions were made as to the proceeding that was had. I have a memorandum of the items of evidence made at the time.

Q. That were offered in evidence?

A. Yes; which I used on the trial.

Mr. LIONBERGER: We object to that, as it is not even a part of the record.

The COURT: I don't see how that would be competent testimony, anyway.

Mr. CLARDY: They claim there was no trial in the case at all; that this judgment was procured by fraud. I think it entirely competent to make the proof.

Mr. LIONBERGER: I think it entirely incompetent to make the proof of what he did. In the proof already offered he says they had a trial.

Mr. MADILL: It is not a question whether the court tried the case. The question is whether the court had jurisdiction to try the case.

The COURT: I do not remember what the allegations of the bill are in that respect.

Mr. DINNING: Because two of the trustees in the deed were dead, and they further seek to set aside the decree because it was procured by fraud. Now, it seems as though any testimony introduced would throw some light on that trial. They say it was a fraudulent trial, amounting in law to no trial.

138 The WITNESS: I don't know anything about the death or life of the trustees one way or the other. I was not acquainted with any of them; never saw any of them.

Defendants' counsel offer in evidence the copy of acknowledgment of service on Green L. Poplin spoken of.

Mr. LIONBERGER: We object to that, as the papers themselves are the only proper evidence.

The COURT: That will be admitted subject to the objection.

Defendants' counsel offer in evidence the memorandum produced by the witness showing the testimony that was offered by the plaintiff and the defendant on the trial of the case referred to.

Mr. LIONBERGER: We object to it as incompetent to show what testimony was offered in fact.

The COURT: If you make your offer in that form the objection has to be sustained. Propound your question to the witness and let us see what it is.

Mr. LIONBERGER: It is immaterial what particular evidence was offered.

Mr. CLARDY: Then I offer to ask the witness what testimony was adduced on the trial of that case.

The COURT: I rather think the objection ought to be sustained to that. If there was a trial I apprehend it does not make any particular difference what the testimony was.

To which ruling of the court in sustaining the objection defendants' counsel then and there excepted.

Cross-examination by Mr. LIONBERGER:

Q. Do you remember at what time you represented Butler county, prosecuting its suit against the Cairo & Fulton R. R. Company and the trustees in the mortgage?

A. No; I can't be positive as to the dates, Mr. Lionberger.

Q. Were you at — time a resident of the county?

A. No, sir; my home has always been in Iron county, ever since I have been a young man.

139 Q. Were you to have a contingent fee in the result?

A. Yes, sir.

Q. Do you mind stating what that was; what that fee was?

A. O, certainly not. It was either 20 or 25 per cent. of the amount recovered. I am not certain which it was.

Q. That is, of those lands actually vested out of the railroad and trustees?

A. Yes, sir.

Q. In the termination of the suit in 1869 did you receive a conveyance of the lands which were to be conveyed to you?

A. To myself and under my direction; yes, sir.

Q. George W. Emerson is your brother, is he not?

A. Yes, sir.

Q. Sarah Emerson is your wife?

A. Yes, sir.

Q. And the other persons to whom conveyances were made in 1869 were persons you designated; persons you wished to have lands conveyed to on account of your fee?

A. Well, my recollection is—I will explain just how that was if you will allow me.

—. Yes.

A. I will state, then, that George W. Emerson, the man mentioned there, was a young man, a boy at that time about of age, and I had him at West Point Military Academy and couldn't keep him there and desired him to go to the university and pursue a course of study; that is preliminary, and I had at that time a large quantity of wild land in different counties which I bought from time to time, and I actually was tired and sick of holding wild lands which I was unable to sell out. At the time of the final recovery by Butler county wild lands were unsalable, and I did not regard them as amounting to very much in value, and I said to him, "If you will proceed now and make sales and take charge of that business you may have all those lands."

The COURT: I think it hardly necessary to encumber the record with that.

Mr. CLARDY: I think it competent, in view of the fact that
140 they introduced testimony.

The COURT: He conceded the conveyances were made to him or persons designated by him. Why he designated such and such a person is immaterial.

Mr. CLARDY: To show the relationship between the parties.

The COURT: He admits that they cover the whole amount.

The WITNESS: I don't know what is the allegation in this petition, but by one of the counsel I was informed that there were some charges made that ought to be explained.

Q. A charge made that the decree was procured by fraud?

A. I don't know that the disposition of the lands have much bearing upon that point, but will say, at that time, my recollection is now, of course not having looked at the record since that time, probably about a thousand acres were selected to be conveyed to me. I think I am mistaken as to the quantity; probably a couple of thousand acres to myself and the balance was to be turned over to my brother. In the selection of it he had to get parties to help him.

Q. I don't care about bringing out any further the facts; they appear already in evidence.

A. In getting parties to assist him in the selection, the surveying and all that sort of thing, why he made appropriations to different

parties who rendered services to him in getting the matter finally consummated under that decree.

Q. But they were lands you received in consideration of divesting the title of the Cairo & Fulton R. R. Co. and the trustees?

A. Whatever they were.

Q. Now, will you state if there was an order for the conveyance in August, 1869, to you or your relatives of those lands? Was there an order made by the Butler county court charging you with fraud and revoking on those grounds the conveyance; do you remember an order of that sort?

A. Yes, sir.

Q. What was the ground of that charge?

A. I will explain that very fully. The ground of it was
141 that the commissioner in issuing the patents for the grant inserted certain clauses in the patents which the county court objected to, and the county court hastily made an order undertaking to revoke the patents, not as to the original contract or grants, but they were simply displeased at the character of the instruments which were made by their commissioner. Those clauses, when our attention was called to it, I said to my brother at the time that those were unimportant; I didn't care anything about those there. The patents were thus with authority canceled and new ones issued according to the views of the county court, or else that clause was stricken out of the face of them. I can't now remember which. But, at any rate, the county court at a subsequent time, as I remember, I know they did verbally make apology to me for their hasty action in the matter, because they were perfectly willing to have done what was done, and they made an order afterwards revoking or setting aside what they had done before. That is my recollection. 20 years is a long time to remember particulars, but I know the very undignified and hasty action of the court, of which I complained, and they apologized and the matter was settled amicably. The patents or deeds or whatever they were, in different forms, were finally issued and all unsatisfactorily.

Q. And the charge of fraud was revoked by the record?

A. Yes; I believe it was of record. I know it was, verbally.

Q. You drafted the decree in the case of Butler Co. *v.* The Cairo and Fulton R. R. Co.?

A. I drew it, drafted and suggested it to the judge at the time, submitted it to him before it was entered.

Q. In fact you do not know, except from memoranda you made and upon which you have been questioned, that service was actually had upon any of the defendants in this case; that is true or is it not?

A. I don't exactly understand.

Q. Suit was brought by Butler county against the Cairo & Fulton R. R. Co., John Moore, John Wilson, and A. G. Waterman, was it not, trustees under the deed of trust?

A. I presume so; it is a long time ago, but I think those are the names.

142 Q. Did you know the parties to the suit—all of them—Mr. Emerson?

A. No, sir; I did not know the trustees at all. If I ever saw any of them, I don't know it.

Q. Do you know whether service was had upon any of the defendants?

A. I know as to the defendants. *A.* I know as to the defendant R. R. Co., because it was a resident of the State of Missouri. I knew these parties personally. I knew Poplin very well. I knew Mr. Bedford and the other parties that were directors of the company at that time.

Q. Do you know when the service was had upon the Cairo & Fulton R. R. Co.? Does your memorandum show that fact?

A. I think it does. I will look and see (looking at memorandum). March 9th, 1867, my date shows.

Q. Service was had——

A. (Interrupting.) That is a copy.

Q. Did you know the directors of the Cairo and Fulton R. R. at that time?

A. No, sir; except Mr. Poplin was one, I understood, of course. My understanding, of course, was that Mr. Bedford was another of the directors, but I don't know whom the others were.

Q. Do you know whether Bedford was a resident of Missouri at that time—Mr. H. H. Bedford?

A. I think so.

Q. He was a party to that suit with the Cairo & Fulton R. R. Company?

A. I just understood that he was a director of the company.

Q. Was he a party defendant, do you know; do you remember?

A. I don't think he was named as a defendant, except so far as being a director he would be interested in the company.

Q. You don't know whether he was a defendant or not? Do you know whether service was had upon him?

A. I don't know that it was. It was had on the company, as I understood. We were proceeding against the R. R. Co. as a corporation, not against individuals.

Q. Now against them as individuals?

A. Of course not. I never had any idea at that time.

143 Q. (Interrupting.) Did you direct the issue of the writ to the Cairo & Fulton R. R.; do you remember that?

A. In filing the petition I presume I directed the writ to issue.

Q. Do you know in fact whether Henry H. Bedford was at any time a party defendant in the suit of Butler Co. *v.* The Cairo & Fulton R. R. Co. *et al.?* Was he made party defendant?

A. Not by name, so far as I know.

Q. Could he be in any way except by name?

A. Yes; as a stockholder in the company, I suppose he could. I think Green L. Poplin was president. I understood he was.

Q. Green L. Poplin was president?

A. That is my recollection. We treated him so, I see in the papers of service.

Q. Was he present as a director? Was he named as a party th-ough Henry H. Bedford?

A. I will answer that by stating I understood Bedford was a stockholder and a director of the Cairo & Fulton R. R.

Q. You knew any interest he had in the Cairo & Fulton Railroad Co. was bound by that decree, I suppose?

A. I mean to say we did not proceed against H. H. Bedford as an individual.

Q. He was not a party by name?

A. Not a party — name; certainly not.

Q. Was Mason Brayman a party to that suit?

A. I could not tell you except by looking at the papers in the case. I did not know Brayman, so far as I remember.

Q. Do you know whether Albert G. Waterman was alive at the time that suit was brought?

A. No, sir; I don't know anything about the trustees.

Q. Where did you get the names of those trustees? You prepared the petition, did you not?

A. Most likely from the records. I presume so. I could not tell you now the source of my information. Most likely from the records of the deed of trust.

Q. You prepared the decree, did you not?

A. I drew the form of it; yes, sir.

144 Q. Do you know whether Albert G. Waterman was served with process in that case or not?

A. No, sir; I do not.

Q. Do you know whether John Moore was served with process in that case?

A. No, sir; my recollection is that the publication was out as to them as non-residents.

Q. Do you know if John Wilson was served with process in that case?

A. No, sir; I do not know; I think not.

Q. Default was taken as against those gentlemen?

A. My recollection is that there was, but I have not any copies of the entry of decree on the record. That would be my recollection. It is the course of legal procedure, and my impression would be that default was taken against them, but I will not say positively as to that.

Q. A judgment by default, that is the recital in the record (reading recitals of record). Do you remember getting that order or judgment of the court on the 20th of April, 1867?

A. I do not now have a clear and distinct recollection of that, but I have no doubt that is just what happened.

Q. You obtained in 1867 a default against those gentlemen?

A. I think so. That would be the first term after publication was made and filed; that would be the time we would take a default, of course.

Q. Did you preserve a copy of any of the pleadings in that case? Did you preserve a copy of the petition?

A. I have somewhere a rough sketch of the petition first drawn

up, not as it was finally completed, a mere outline; that I remember.

Q. You have never kept a copy of that?

A. No, sir; I have not a copy of any other of the completed pleadings, except these memoranda I have here—that is, of a demurrer and a motion.

Q. Who filed the demurrer; do you remember that?

A. Yes, sir.

Q. Which one of the parties defendant?

A. Well, the papers that I have here, copies, show that the demurrer and motion also that was made—one Mr. Clardy did not read, did not introduce—show that they were filed on behalf
145 of the defendants generally.

Q. But you had judgment on the default before those answers were filed, did you not?

A. Yes, sir.

Q. After they were filed did you ask leave to have the default set aside?

A. They were not answers; one was a demurrer, the other was a motion to dismiss or to strike out the petition.

Q. All that was filed after the default?

A. Long afterwards; you see the cause ran along three or four terms after that.

Q. Judgment by default was set aside; do you remember that?

A. I have no idea it was ever set aside.

Q. You have no idea it was ever set aside?

A. I don't remember any entry of that kind.

Q. Does your memorandum show if the attorneys who signed that demurrer appeared or not?

A. They will just speak for themselves; there are two copies I have here, accurate copies of those two papers. One is a motion, the other is a demurrer, and they are both general in their terms. I proceeded upon the theory that the attorneys were appearing generally for the defendants, and had no knowledge to the contrary at any time.

Q. You had already got a default as to three of the non-residents served by publication?

A. Yes, sir.

Q. You understood they were still before the court notwithstanding the default?

A. Certainly; I did not understand they were out of court. I supposed I kept them in court; that was my understanding as a lawyer, and I think still they were in court.

Q. The only thing you have, then, to show that John Moore, John Wilson, or A. G. Waterman ever appeared in that suit is that memorandum there which shows that Chapman, Bedford and Owen appeared for the defendant or for the defendants?

A. Except the publication. The publication was supposed to bring them in first, and afterwards I supposed that they were represented in the Cairo & Fulton R. R. generally by those attorneys that still filed papers to that effect, and, as I had no notice to the

contrary, I acted on that theory; whether mistaken or not
146 I cannot say.

Q. You know as a fact that Green L. Poplin was the only party served so far as this case went. You don't know any person also that was served?

A. I don't think any person else was served by writ.

Q. Was any — else ever personally served?

A. I think not.

Q. You don't know that any attorney represented those three trustees, John Moore, John Wilson, and A. G. Waterman?

A. I have no knowledge excepting the pleadings. I don't know personally anything about the relations of the attorneys with those trustees; of course not.

Q. You had access to those pleadings at all times, of course you had, in your connection with the case?

A. Certainly.

Q. And after the termination a rule was made requiring you to show cause—whether you could produce them or not?

A. Yes; some time afterwards. Some attorneys in a suit here, Mr. Glover here in St. Louis was one of them, attorneys on behalf of Mr. Chouteau; I don't know who it was; they got a rule on all the attorneys. I had myself tried to get copies from the clerk some time before that, complete copies of the files, and I was informed by him they could not be found.

Q. Did you produce those copies you now have for the information of the court or make any allowance to them?

A. No, sir; I don't think I did. I don't remember that the rule required anything but the production of the files in the cause.

Q. Do you remember the substance of your return, though?

A. No; it has totally escaped my recollection, if anything of the kind occurred.

Q. Do you remember that you made at that time any effort to find them yourself or towards completing the files?

A. I knew I hadn't them, because I had not long before applied to the clerk for files and the clerk told me that they were missing; that he could not find them. I went to the judge of the court who tried the case, thinking possibly he had them in his saddle
147 bags. We traveled at that time on horseback through the country, and he occasionally was careless about papers; sometimes carried papers home with him. I found that sometimes to be the case. I went to him and inquired when I was informed I could not get copies. He had not them; told me he had not, at any rate. I had no knowledge, of course, of anything about them.

Q. In fact, you did not at that time produce copies of the answer you have there?

A. I was not required to, so far as I know; they were more copies of the—of what they purport to be.

Q. When you prepared your draft of the decree you made your recitals in view of those memoranda you now have, or did you have the files complete before you?

A. I know I drew the draft or form of the decree, probably in the

evening or soon after the trial of the case. I remember the judge requested me to prepare a form of decree. I did so and submitted it to him. He made some changes in it and finally gave it to the clerk.

Q. Do you remember what changes were made in it by the judge?

A. No; I can't recall distinctly. I remember some words were stricken out; some arranged.

Q. No substantial alteration?

A. I don't think that there was; my impression is that there was nothing extensively changed.

Q. Do you remember the recital in that decree that the defendant had been duly served with process—all of the defendants?

A. No; I can't recall now any distinct——

Q. If that recital is found there, what did you intend it to mean, "served by publication"? When you say "served by process"?

Defendants' counsel objected (no ground stated).

Q. (Continuing:) In that draft of the decree what did you mean by "served by process," served personally or by publication?

A. If I wanted to be very exact about it, I would recite the facts as I understood at the time, that the defendant The Cairo & Fulton R. R. Co. had been duly served with process, and that
148 the defendants so and so, naming them, had been duly notified by publication, they all having appeared, by attorney, in the case, and the court proceeded——

Q. (Interrupting.) You make a distinction in your mind between service by process and service by publication, do you? When you made that draft of the decree did you mean by service of process that they had been personally served?

A. Probably not.

Q. You don't say you intended at that time they had been personally served—all the defendants—Green L. Poplon having been the only one personally served?

A. I meant, of course, in drafting it, undoubtedly, just to make it conform to the facts.

Q. But the fact is that they were served by publication and the recital is that they were served by process. Would you say service by process in case they were served by publication?

A. I should say so, especially if the parties appeared by attorney. I will state that, as a matter of fact, what the relations of those parties were—the non-resident parties—I have no personal knowledge. I acted on what appeared on the face of the record and the pleadings, having no knowledge but that they were employed—as sometimes they were—by the railroad company; and I proceeded in the case accordingly. I don't know anything about the facts underlying that, you know.

Q. Was John Moore present at the time you had those proceedings, or was John Wilson or Waterman present?

A. If I ever saw any of those gentlemen, I have no knowledge of it at all.

Q. You never saw them personally?

A. Not that I know of. If they were there, I don't know it.

Q. At the time the case was called for trial, do you remember whether there were numerous or few people—how many people were there, about?

A. Well, I can't give you much of an idea as to the number of people.

Q. Was the trial had in open court or chambers?

A. In open court.

Q. Did you see many people there at the time judgment
149 was rendered or the case called for trial?

A. No, sir. I can't give you any idea how many. My recollection is that there were a number of people.

Q. Was Bedford there?

A. I think so.

Q. Was Chapman there?

A. Well, he may have been there; it is very likely he was. I don't remember distinctly.

Q. Do you remember any protest made at the time—any suggestion made of the death of these parties defendant?

A. No; if any remarks of that kind were made at that time by anybody they were not made in my hearing.

Q. Was any testimony introduced by the defendants? Did they put in anything to rebut the evidence offered by the plaintiff at that time?

A. No, sir.

Mr. CLARDY: We object to that.

Q. No evidence was offered for the defendants at the trial?

A. They were there in court—attorneys who had been in the case; that includes at least Mr. Bedford—but for some reason—my understanding is that the defendant did not have any further interest in the controversy or something of that kind, and that he would not further defend the case. At any rate, they did not, and that was my understanding as to why they were not doing it. I recollect Mr. Chapman said he would not defend any further because they had not paid him his fee or something of that kind.

By the COURT:

Q. In the pleading or appearance entered for the Cairo & Fulton R. R. Co. before these demurrers or motions were filed did you have a hearing?

A. The appearance—the counsel for the R. R. Co., as I understood, appeared directly the first term after the return term.

Q. Did they file any pleadings at that time?

A. Certainly. They filed the demurrer that was read a little while ago. Subsequently they filed a motion to strike out—amend the pleadings.

Q. Were all the defendants required to appear at the same term? Was the order of publication requiring the non-residents to
150 appear at the same term to which the Cairo & Fulton R. R. Co. was summoned to appear?

A. Independent of any knowledge of the record or date, it is pretty difficult to answer that question now. My paper here shows that the R. R. company was served, service had on the president, I think, March, 1867, and I guess the next term of the court was in May, probably. I don't remember the date now, it is so far back.

Mr. LIONBERGER: March and September?

A. (Witness continuing:) Well, my recollection now is that they appeared at the first term after service. Of course, I think the first thing they filed was a demurrer.

The COURT: What is said of the order of publication as shown by the record?

Mr. LIONBERGER: Order of publication returnable to the September term, 1866, default had in 1867 as against John Moore, John Wilson, and A. G. Waterman, they not having appeared.

The COURT: At that time the Cairo & Fulton R. R. Co. was not served?

Mr. LIONBERGER: The Cairo & Fulton R. R. Co. was not served when the default was taken as against the trustees the way it appears here. The default was taken the 20th of April, 1867, as to the three trustees.

The WITNESS: I suppose suit was brought in 1866, was it not?

Mr. LIONBERGER: Yes; the demurrer was filed March 29th, 1867, according to the recital here.

The WITNESS: March term, 1867 (looking at his memorandum.) The next was a motion to strike out.

By Mr. LIONBERGER (continuing): Did Chapman, I want to ask you, ever get any of the lands which were given to you as a fee in that suit?

A. Well, I am not clear about that now. I am not positive about that. I think my brother, in getting assistance in the matter of selections and getting the business closed up, gave different tracts to different parties. There was so much of it—and the truth is I didn't regard it as worth very much—we were glad to get—to
151 be able to get some service in getting some other selections made and in the final grants from the court, perhaps, and so on. I am not certain, but I think he may have conveyed direct or had conveyed to Chapman a small tract for some purpose of that kind. I am not certain about that.

Defendants' counsel offer in evidence the motion to strike out in the memorandum of the witness here produced, as follows:

In Butler County Circuit Court.

BUTLER COUNTY
vs.
CAIRO & FULTON RAILROAD COMPANY, A. G. WATERMAN, JOHN MOORE, *et al.*

Now come the defendants and move the court to strike out the plaintiff's second amended petition herein for the following reasons:

1. Because said petition contains scandalous matter.
2. The allegations therein are impertinent, redundant, and immaterial.

(Signed) BEDFORD, OWEN & CHAPMAN,
Attorneys for the Defendants.

Filed October 2, 1868.
(Signed) ISAAC V. TUBB, *Clerk.*

Testimony of S. M. CHAPMAN, on part of defendants, is as follows:

Direct examination by Mr. CLARDY:

Q. Where do you reside?
A. I reside at Poplar Bluff, Mo.
Q. Where did you reside in 1868?
A. I resided at Bloomfield, Mo.
Q. Did you have any connection with the case of Butler County *v.* The Cairo & Fulton R. R. Co. *et al.?*
A. Yes, sir; some twenty or twenty-one years ago.
Q. State what connection you had with the case.
152 A. I was retained to——
Q. (Interrupting). What is your profession?
A. I am an attorney by profession.
Q. Well?
A. I was employed to aid in the defense of the suit against the company.
Q. By whom were you employed?
A. I was employed by Mr. Bedford, and I had a talk with Mr. Poplin—Dr. Poplin—Greene L. Poplin.
Q. What relation, if any, did Mr. Poplin sustain to that railroad company at that time?
A. He was understood to be president of the company, as I now remember.
Q. Where was that case pending?
A. It was pending in the circuit court of Butler county, at Poplar Bluff.
Q. What did you have to do with it? State to the court all you recollect about it.
A. It is so long ago, and my memory is not distinct. I remember having prepared some pleadings—demurrers, perhaps—and motions, and the answer. I have no distinct recollection about the signing. I cannot say about that.
Q. What did you do with those pleadings?
A. They were filed, some of them. I prepared them prior to the term.
Q. At the time what connection, if any, did Major Bedford have with the Cairo & Fulton R. R.?

Mr. LIONBERGER: We object, unless he knows of his own knowledge.
The COURT: Well, that is what is asked—his knowledge of that.

A. I don't know. I have never seen any record, that I am aware of, showing him to be a director or holding any official position. I can only state in a general way.

Q. Well, how had he been acting?

A. As a director of the company.

Q. Were you present at the time of the trial of this case?

A. I was.

153 Q. Do you remember when it was—what year?

A. Well, necessarily I could not be positive within a year.

Q. What judge—before whom was it? What judge was on the bench?

A. James H. Vail was the judge.

Q. Who represented the plaintiff?

A. Judge Emerson and perhaps Judge Leonard; afterwards Judge Ira E. Leonard.

Q. What was done at the trial of this case?

A. In what way? There were some records introduced. I couldn't say so much about the testimony, but I remember distinctly of some records; perhaps one or two witnesses. I remember more particularly about the record.

Q. Who else was present? Was Major Bedford present?

A. I think that Major Bedford and Judge Owen were both present at the time.

Q. Was there any appearance at the time of the trial for the defendants or any of them?

A. I can speak more confidently with regard to my own action. The trial, I can say, was in the main *ex parte*.

Q. You spoke of having been employed in the case?

A. Yes, sir.

Q. Well, at the time of the trial—did you participate at the time of the trial of the case?

A. I did not take any part in the trial. I was present in the court-room, but I was rather a silent looker-on.

Q. Why?

A. I was assured of a fee, and I had stated to Major Bedford and Dr. Poplin that unless my fee was paid or secured that I should take no part in the trial. That was some time—perhaps three or six months—before the case was tried. They paid no fee, and I declined to take any part in the trial. I was to have taken perhaps the most active part in the trial. That had been the understanding. It was not the understanding, though, at the time that any one represented the company, because I had distinctly stated

154 that unless I received some compensation that was in a way that was tangible I could take no part in the trial or do any more work in the case.

Q. Did you at any time pending the suit appear in court for the company or the trustees?

A. I had argued some motions in the case, and perhaps a demurrer. It is so long ago I don't recollect very distinctly; I can't recall all those things. It was the same as the trial of other cases

I was retained in. I think I have quite a distinct recollection of arguing perhaps a demurrer.

Cross-examination by Mr. LIONBERGER:

Q. You were retained, I understand, by Greene L. Poplin, representing the Cairo & Fulton R. R. Co., and he was to pay you $500 for your compensation, was he not?

A. Major Bedford had more to do about that.

Q. You were to be paid by the road $500 to represent them in that case; as they failed to pay, you did not appear?

A. I did not appear at the time of the trial; necessarily I was silent.

Q. Did you ever get your fee out of them?

A. I never received any compensation whatever; not a nickel.

Q. You were never retained personally by John Moore, Wilson, or Waterman?

A. If I ever saw either of those gentlemen I have no recollection of it now; in fact, if I ever saw them I am not aware of it.

Q. You never had any personal relations with them?

A. I never did; no, sir.

Q. Or professional relations with them?

A. I never had any correspondence with either of the gentlemen. Did you include Brayman? I am not certain but I did see him.

Q. No; I did not mention Brayman.

A. I never saw either of those gentlemen; I am quite positive.

Q. You had no professional relations with them, then?

A. I never had any correspondence—any business relations—with them.

Q. And never presumed to appear for them in that suit?

155 A. I can only answer by saying that I was employed by Dr. Poplin and so far as that defendant was concerned. I had no correspondence and never was employed by Wilson, Waterman, or Moore in any way.

Q. You were not a partner as Chapman, Bedford & Owen; you were not a partner with Bedford and Owen at that time?

A. I never was in my life.

Q. You did not appear in conjunction with them in that suit, appearing for the defendants?

A. In conjunction I appeared with them; yes, sir—that is, I appeared as attorney.

Q. At the request of Bedford and Poplin?

A. Yes, sir.

Q. Who was to pay you $500?

A. I understood it was to come through Brayman, and that was the reason I did not continue in the case further. I learned that Brayman was not very reliable financially and not very prompt in paying and I so informed Bedford, and he then promised to go and see Brayman, and my present recollection is that he stated he went to Springfield and had a conference with Brayman, who assured him I should be paid the amount of $500.

Q. Several months before you had notified him you would not appear unless the money was paid?

A. It was some time before; I can't say how long; it is some time ago. It was some time before the trial; I can say that.

Q. Was any evidence offered on behalf of the defendants in that case at the time of the trial? You say you were in court.

A. If there was I have no recollection of it, and I think I would recollect it if there had been; I would not say.

Q. It was an *ex parte* proceeding, you say?

A. That is my present recollection. I know I don't remember, have no recollection, of any one else appearing.

The defendant The St. Louis, Iron Mountain and Southern R. R. Company here rests, except as to damages sustained.

Mr. DINNING: I don't recollect whether we got in the ob-
156 jections as fully and definitely against this contract and deed as we want. Let the reporter make a note that we adopt the objections made by Judge Madill in connection with those we have made; that will prevent repeating them over. As to the omission of this paper called a "contract," we insist that it is a nullity.

The COURT: You mean between Butler county and the Iron Mountain R. R.?

Mr. DINNING: Yes, sir; between Butler county and the Iron Mountain R. R. Co. We also adopt the objections made by the gentleman in relation to the deed itself.

Defendant Butler County offers in evidence the report of Ira N. Davisson, swamp-land commissioner, dated September 17, 1874, and the order of the court made thereon.

(Omitted by consent.)

(Mr. Clardy objects for Iron Mountain R. R. Co. and then withdraws objection.)

Mr. MADILL: I don't see that we are interested in that at all.

Mr. DINNING: Then it is admitted by the defendant Iron Mountain R. R. Company that this report read in evidence by Mr. Davisson has reference to the contract which was read in evidence by the railroad company, and the lands are the same?

Mr. CLARDY: I don't know whether the lands are the same or not. I will admit that reference to the report.

Mr. DINNING: That it has reference to the contract which was first offered in evidence by the R. R. company?

Mr. MADILL (after statements of counsel): If I understand it, so there will be no misconception, the railroad company reserves the right to introduce one act of the legislature—possibly two—and the other defendant desires to call one witness simply as to the question of adverse possession.

Friday morning, June 12, 1891, trial progressed.

157 CHARLES S. HENDRICKS, sworn for defendant-, testified as follows:

Direct examination by Mr. GROVES:

Q. You are one of the defendants in this case, are you not?
A. Yes, sir.
Q. Do you know where sections 9 and 10, township 22, range 7, are?
A. I do, sir.
Q. Have you any land on those sections?
A. I have.
Q. When did you purchase those lands, Mr. Hendricks?
A. I think it was in 1869.
Q. Is that *that* the deed by which you purchased it (showing paper)?
A. Yes, sir.
Q. At the time you made that purchase what did you do in relation to taking possession of those lands, if anything?
A. Well, I went on it. There was a little opening, a little improvement. I went on it.
Q. You went on the land, did you?
A. Yes, sir.
Q. Did you live there any then?
A. I staid there pretty nearly all of *of* one summer the first year.

Mr. DINNING: I don't know how far we ought to go. The railroad company is not represented.
The COURT: The hour was set.

Q. After you took possession what did you do?
A. I went to work on the place.
Q. Was there a house on any part of it?
A. Yes, sir; there was a little cabin on it.
Q. Some improved land?
A. Yes, sir.
Q. After you went off it personally what did you do with it then?
A. I worked it myself and had it worked.
Q. You had it worked?
A. Yes, sir.
Q. When were you working there last—how long since?
A. Well, I last worked there in 1879, I think.
Q. Haven't you been on there working since about two years ago?

158 A. Yes, sir; I went down there many years since. Then was the time I had the land cultivated. I had to get away from that country.

Q. What made you leave the country about that time?
A. Robbers came in on me; killed my nearest neighbor and robbed my house.
Q. Afterwards you went back?

A. I went back temporarily, yes; but I got frightened, you -now. My wife wouldn't stay there.

Q. You paid taxes on it from time to time?

A. On some of it I paid taxes ever since I had it; some I did not. Others stepped in and paid the taxes.

Counsel for defendant offers in evidence the deed produced by witness.

Mr. LENTZ: We desire to interpose the following objections: 1. It purports to be a deed from John Beck. There is no showing that John Beck ever had any title in that land. 2. There is no seal to the deed, and therefore it is not a deed.

Mr. GROVES: A shadow of title, a color of title.

Mr. LENTZ: An unsealed deed does not even amount to a color of title.

The COURT: It is admitted subject to the objection. How much land does it cover?

(Omitted by consent.)

The WITNESS: A section and a half, the whole of ten and half of nine, the east half of section nine.

Q. (Mr. GROVES continuing:) Now, are you acquainted with Alfred Kelly?

A. I am, sir.

Q. Do you know where he lives?

A. Yes; I expect I do.

Q. How long have you been acquainted?

A. It must be something like 20 or 21 years.

Q. How long has he lived where he now lives?

A. Ever since I knew him.

Q. Do you know when he took possession of the land that he now lives on?

A. I couldn't tell you the date.

159 Q. Well, it is something like 20 years or more?

A. Yes, sir.

Q. Did you know the land before he went on it?

A. Yes, sir.

Q. Who owned it before he lived on it, prior to that time?

A. A man named Elkin Pedigo.

Q. Do you know what section it is in?

A. I think it is section 25—the house is; and I believe his land extends over into the next section.

Q. The section to the south of it?

A. Yes; to the south.

Q. That is 36. Do you know where the line runs in relation to his house?

A. The line I know is a little south of his house, but I couldn't tell exactly. I couldn't say where, but not far from the house.

Q. How, in relation to his barn, stables, cribs, and blacksmith shop, etc.?

A. I think probably that those portions of the outbuildings to-

wards the south. His blacksmith shop, I think, is in the southern section.

Q. Then you mean to say that the section line between 25 and 36 runs between the house and the blacksmith shop and the barn?

A. Yes, sir; a part of his buildings is on it.

Q. Do you know what part of the section that is, what part of section 36, the east half of the section or the west half?

A. No; I couldn't tell you.

Q. You couldn't say positively?

A. No.

Defendants' counsel offer in evidence a deed from Elkin Pedigo to Alfred Kelly, dated the 13th of April, 1870, an administrator's deed, by John Snoddy, administrator.

Mr. LENTZ: We object to its introduction, as there is no foundation laid for its introduction, no showing that Elkin Pedigo ever owned the land or had anything to do with it.

And the deed is admitted subject to the objection.

(Omitted by consent.)

160 Defendants' counsel offer in evidence a deed running to Alfred Kelly, a deed made by the sheriff of Butler county to Alfred Kelly, dated the 7th of May, 1880, which purports to sell the title of George F. Emerson.

Mr. LENZ: We make the objection to this deed that there is no title shown in George F. Emerson.

And the deed is admitted subject to the objection.

Q. Now, Mr. Hendricks, you know where this S. E. quarter of 34 is, township 23–7, where Cato now lives?

A. You ask whether I know it; yes, sir.

Q. How long have you known it?

A. That land? Why, I know the land ever since I was down there.

Q. Who was living on it the first time you ever knew it?

A. The first time, nobody.

Q. How long have you known that somebody lived on it?

A. I think it must be probably something like five years.

Q. Who was living on it five years ago?

A. A man named Cato.

Q. Is he living there yet?

A. The last time I was down there, probably three or four months ago, he was.

Cross-examination by Mr. LENTZ:

Q. In regard to this land in sections 9 and 10, how much of that land have you been in possession of and what part?

A. What part and how much of it? Well, I conclude I have been in possession of all of it.

Q. I mean how much of it that has been in actual possession and of what part of it have you been in actual possession?

A. There is probably 160 acres, and there is 240 acres or something like that—do you mean just the field, the open field?

Q. Yes; I mean how much have you in cultivation.
A. There has been in cultivation, I suppose, probably 30 to 35.
Q. Now, what part of the section?
A. In two different parts.
Q. Give me a description of the different parts.
161 A. Mr. Lentz, that is rather a hard thing for one who is not a surveyor to do.
Q. Give it as near as you can.
A. About the center of section 10, and the piece runs through the center of section 10 from above down.
Q. How far down?
A. Almost clear down to the end of the section. I suppose it comes anyway within a quarter of the section boundary of the section, if I remember right.
Q. Then, as I understand you, it commences at the northern boundary?
A. Not exactly; I couldn't say that. It is a narrow strip; it is a narrow strip divided in two pieces, woods between it; pieces of land was picked out, you know, for cultivation. In fact, when I bought the whole of the land during the rebellion the houses were burned down and the fences.
Q. I am asking now simply about the parts of the land in cultivation?
A. That is what I say; about the center portion of the section.
Q. What section is that?
A. Ten.
Q. Is it the east or west half of section 10?
A. Well, the center is the center; nearly northwest; you told me to tell you as near as I can. I told you twice about the center.
Q. Have you ever had a survey made to know?
A. Yes; there has been several surveys made, but I don't remember exactly where the lines run.
Q. There is about 30 to 35 acres running down very near the center?
A. There is a good deal more now, but when I had last control of it I don't think there was more than 35 acres; maybe 40; I don't know.
Q. Now, you said you have two pieces. What other is there?
A. Well, I think that was all that was open then.
Q. In section 9—is any of that in cultivation?
A. No, sir; none of that in cultivation.
Q. Mr. Groves has asked you about some land in section 34?
A. Yes.
162 Q. I believe that you said that was occupied by one Cato?
A. Yes, sir.
Q. Now, do you know the desciption of that land?
A. The description of it, I couldn't exactly say.
Q. You simply know where the land is located, but don't know what the description of the land is?
A. I don't know what 40 it is.
Q. You don't know whether it is the northeast quarter of the

southeast quarter or the southeast quarter of the southwest quarter, or what part?

A. I couldn't say. I only know it is in section 34 from the location. I judge it must be because it is west of ——'s place.

Q. But you don't know whether it is the land described in these deeds or not, do you?

A. I couldn't say that; I don't know; I don't know what is described there.

Q. All you know about it now is simply the fact that Cato is living on some land there, and know where he lives?

A. Land he bought of Alfred Kelly, said to be in section 34, and from the location I judge it is.

Q. But what part of section 34, you don't know anything about that?

A. No.

Q. You have testified also in regard to the land of Alfred Kelly, where Alfred Kelly lives. I understood you to say that the place where he lives is in section 25?

A. I think the house is there.

Q. And the tract you said was formerly owned by whom?

A. By a man by the name of Pedigo.

Q. Do you know the location of that land?

A. The Alfred Kelly land? Yes; only what he showed me himself.

Q. Then, in substance, all you know about it is his statement that he owned the land there, and you know where that land is?

A. I knew that was in section 25 from the location, but couldn't tell you exactly.

Q. But you can't tell in what part of section 25 it is?

163 A. No; I could not.

Q. You said something about land to the south. In the section south of that, what section would that be?

A. Thirty-six.

Q. You said something about land to the south. In the section south of that, what section would that be?

A. Thirty-six.

Q. Can you tell what part of section thirty-six is claimed by Kelly?

A. I don't know exactly what—40 or 80. No; I don't know how much it is.

Q. You don't know, as a matter of fact, whether the land described in this deed of Pedigo to Kelly is the land that Kelly occupies or not, do you?

A. How is that?

Q. You don't know as a matter of fact whether the land described in this deed from Pedigo to Kelly is the land actually occupied by Kelly or not, do you?

A. I would not say that I do. I couldn't say about the location.

L. D. GROVES, of counsel for defendants, sworn for defendants, testified as follows: I know where Kelly lives, and I know that if the Government plats are correctly drawn that his house must from necessity be on section 25, and that his farm cleared up that is used in connection with it is on section 36; and I know, too, from the plats and the streams of water that are marked on the plats where they join together that it must be on the northeast quarter of section 36. The house is in the southwest quarter of section 25, and the clearing is in the northwest quarter of section 36, instead of the northeast, as I first said.

Cross-examination by Mr. LENTZ:

Q. What is your business?

A. I am practicing law.

Q. Are you a surveyor?

A. Not practically; no, sir. I know something about surveying, though; considerable.

Q. Have you made any survey of this land?

A. I have made no survey. I have examined the plat and the location of those streams, and I know the distance from
164 Monacaneck slough laid down on the plat to another little slough that runs into it right on the line of the quarter-section line, so marked on the plat. I have seen both of those sloughs, as they are termed on the plat—Monocanecu slough and the other—and I know the distance from the slough up to his house. I know it is between 200 and 250 feet. I measured it with my eye; I judged it to be that.

Q. Do you know where the line between section 25 and 36 is?

A. I know where that Government plat——

Q. (Interrupting.) I am not asking anything about a Government plat. I ask you if you know where that line is.

A. I know where the plat puts it.

Q. I am asking you whether you know where that line is.

A. That is all the answer I can make. On that plat it is two or three feet from that slough.

Q. Do you know whether the plat is correct, if it located the slough correctly, if it is correctly located on that plat?

A. I know the slough I examined.

Q. (Interrupting.) Answer the question.

A. I can only answer in this way: I know it was a certified Government plat.

Q. That is not an answer at all. I ask you if you know that slough was correctly located on that plat or not.

A. Correctly located on that plat?

Q. Yes.

A. I didn't mark it on the plat myself. I know that is the way the Government plat is.

Q. Do you know whether that plat is correct?

A. I know that is a Government plat—that is all I know about it—and certified to.

Q. Do you know whether it is correct or not?

A. You know I can't know whether the Government surveyors made it correctly; you know that.

Q. Then all you know is that a certain slough is located at a certain place on a certain plat, is it?

A. No, sir; that is not all I said I knew about it. I say that the Government plat, the certified Government plat which I
165 examined, puts the sloughs right where I said it put them, and this one slough coming into the other right on that line. I saw it day before yesterday.

Q. The line running east and west between those sections—do you know where that line is located?

A. I know where the line must be located if that slough is properly marked.

Q. Do you know, not where it must be, but where it is?

A. I know within two or three hundred feet of it.

Q. How do you know?

A. I know where it is within less than that.

Q. How do you know?

A. By throwing my eye over the distance from the slough up to his house.

Q. Do you know the location of the Government corners down there?

A. I know the location within—if the plat is correct, I know the location within—well, as near as my eye can measure, a distance of four or five hundred feet.

Q. The question is whether you know the location of the Government corners, know where it is.

A. I know it just that near.

Q. That does not answer the question at all.

A. I did not see the lines traced.

Q. As a matter of fact, you don't know where a single corner is down there?

A. As a matter of fact, I know within—as I told you, within three or four—within a few feet.

Q. How do you know?

A. As I told you, by measuring, by taking my eye and measuring from his house to the slough, and where the two sloughs come in is on the mark.

Q. Whereabouts is his house located?

A. Where? It is located on the S. W. part of sec. 25—right very close to the line; within a few feet.

Q. How do you know it?

A. By measuring with my eye—guessing at it.

Q. Do you know what township that is?

A. 23–27.

Q. Do you know where section 25, of township 23–7, is located?

A. Yes, sir.

166 Q. Do you know where the corners of the section are?

A. No, sir.

Q. Do you know where any of the quarter-section corners are?

A. Yes; within a few feet.
Q. Do you know where they are; ever been to any of them?
A. I have been.
Q. Have you ever been to any of those quarter-section corners?
A. Well, I have been within a very few feet of it.
Q. How do you know you have?
A. Because I have passed along the road several times.
Q. Passed along the road?
A. Yes; and it is not over—can't possibly be over 25 or 30 feet from the road.
Q. There is no possible chance of your being mistaken as to the location of these lands?
A. I was not there when the Government surveyor went through with his chain.
Q. Were you ever there when any survey was made?
A. Never, excepting what I made myself with my eye.
Q. I thought you said awhile ago that you never made a survey?
A. I said with my eye. I know where the corner is marked on the plat, where these two sloughs come together; that is all I know about it. I have told you a dozen times all I know about it is what the plat says.
Q. You don't know whether that plat is correct or not?
A. I don't know whether anything is correct or not that I do not do myself.
Q. You don't know as a matter of fact that you were ever on section 25 except what somebody told you?
A. Excepting what somebody else told me.
Q. Do you know of your own knowledge positively that you were ever on section 25 or 36?
A. If the Government plats are correct, I do.

The COURT: I understand his knowledge to be this: he saw the Government plat located certain sloughs, and, assuming them to be correctly located on that plat, this parcel was within a certain distance.

Q. I will ask you about the length of that slough.
167 A. I never measured it; it must be, I know, 15 or 20 miles long.
Q. Eighteen or 20 miles long?
A. Yes, sir; if the Government plat is correct.
Q. Were you ever on that slough at any other point?
A. Yes.
Q. It runs through quite a number of sections, doesn't it?
A. Yes.
Q. Now, how is it, I want to know, that you know this land you are speaking of is in section 25 and 36?
A. Just as I told you before; no other way.

By the COURT:

Q. To what extent does that slough vary in high water—a wet season and a dry season?

A. Yes; it does.

Q. To what extent?

A. Oh, at places it overflows a mile or two or three, perhaps; but at this particular place it overflows in one direction, but it does not overflow towards the house at all because there is a high bank coming right down to the slough at that point; quite high. The road runs along the bank of the slough and it is high. I guess it never overflows there; in fact I know it does not, for if it did it would overflow his farm.

Q. Where is Mr. Kelly?

A. At home and cannot come up; his family is sick and he could not come.

Mr. Groves, for defendants represented by him, here rests.

Mr. LENTZ: In view of the testimony introduced today it is necessary to amend the bill, changing the allegation as to some of the land. When we come into court this afternoon we will determine what course we will take about it.

At this point a recess is taken to 2 o'clock p. m.

2 o'clock p. m. trial progressed.

Plaintiffs' counsel by leave of court amend the bill in this case by striking out of the bill the description "the northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter, in section 36, township 23, range 7 east."

The COURT: Is that the land of Kelly?

168 Mr. LENTZ: That is the Kelly land.

Mr. PRIEST: If your honor please, Mr. Clardy was very unexpectedly called to his home in Farmington last evening and is unable to appear here today. He left a memorandum with me of some matters that he desires to introduce in evidence.

Defendants' counsel offer in evidence Mr. Allen's acceptance of the contract with the county court of Butler county (the contract having been already offered in evidence), Mr. Allen's acceptance being upon the face of the contract.

Defendants' counsel offer in evidence a patent for lands in controversy from the State of Missouri to the county of Butler from Governor McClurg, dated the 17th of February, 1870.

Mr. PRIEST: This is under the act of March 10, 1869.

Mr. DINNING: I don't know that we have any objection to that.

Mr. LIONBERGER: We interpose this objection: that that patent recites the fact it was made pursuant to the act of March 10th, 1869, directed patents to be made by the State to those counties, but by one of its sections expressly excepted out of the operation of that act and out of the patents all lands theretofore subscribed by the counties to the Cairo & Fulton R. R. Company. The patent in fact covers those lands, while the authority under which the governor was acting expressly forbade him to do what he has done. I except upon that ground.

The COURT: There is no objection, I understand, to the accept-

ance by Mr. Allen of that contract; that is without objection, is it?

Mr. LIONBERGER: We object, of course, on the ground that there was no contract in fact to approve; that the acceptance by Mr. Allen could not make it good nor binding. We make anew the point we made when the contract was offered in evidence—there was nothing to accept.

Mr. DINNING: We make the same or a similar objection to that acceptance—not to the time when it is offered, but to the
169 document itself—that the paper called a "contract" was not a contract, and if it had been a contract Butler county had no power to make such a contract as is referred to therein.

Mr. PRIEST: The order of the county court, I understand, was offered in evidence yesterday by some one.

And the offer is taken subject to the objection.

Defendants offered in evidence Mr. Allen's acceptance of the contract with the county court of Butler county, contract and acceptance having already been offered in evidence, Mr. Allen's acceptance being upon the face of the contract.

Defendants offer in evidence a patent from the State of Missouri to the county of Butler of date 17th of February, made under the act of March 10, 1869, conveying all lands in controversy to said county. Plaintiffs' counsel objected; the patent recites the fact that it was made pursuant to the act of March 10, 1869; that the act of March 10, 1869, directed the patents to be made by the State to those counties, but by one of its sections expressly excepted out of the portion of that act all lands theretofore subscribed by the county to the Cairo & Fulton R. R. Co.; that the patent in effect covered those lands, while the authority under which the governor was acting expressly forbid him to do what he has done. The court overruled plaintiffs' objection and they excepted.

And this is all the evidence offered; and afterwards, to wit, on the 16th day of July, 1891, the court found the issues for the plaintiffs, and within four days thereafter the defendants, Butler County and others, filed the following motion for a new trial:

Now, at this day, come Butler County, The St. Louis, Iron Mountain and Southern Railway Company, The St. Francis Lumber Company, Chas. Heinrich, and the other defendants in the above-entitled cause, and move the court to set aside its finding and judgment rendered in the above cause and grant said defendants a new trial. These defendants give and assign, as grounds and reasons therefor the following:

170 Because the court erred in admitting improper, illegal, and incompetent evidence offered by the plaintiffs.

Because the court erred in rejecting proper, legal, and competent evidence offered by said defendants and each of them.

Because the court erred in admitting irrelevant evidence offered by plaintiffs.

Because the court erred in rejecting relevant evidence offered by these defendants and each of them.

Because the court erred in refusing to sustain defendants' demurrer to plaintiffs' evidence offered at the close of plaintiffs' case.

Because the court erred in finding the issues herein in favor of plaintiffs and against these defendants.

Because the court erred in rendering a decree herein for plaintiffs and against these defendants.

Because the decree rendered herein is against the weight of the evidence.

Because the decree rendered is not supported by the evidence.

Because upon the pleadings and evidence the judgment ought to have been against the plaintiffs and in favor of these defendants.

And thereafter, to wit, on the — day of ——, 1891, the court overruled the said motion for a new trial; to which action of the court in overruling said motion defendant then and there duly excepted.

On motion of said defendants, the court granted them leave to file a bill of exceptions within —, and within that time said bill of exceptions was duly signed and filed.

Defendants filed their affidavits and bond for appeal to the supreme court, and such appeal was granted.

LOUIS F. DINNING,
HENRY N. PHILLIPS,
L. D. GROVES,
H. S. PRIEST,
MARTIN L. CLARDY,
Attorneys for Appellants.

171 And afterwards, to wit, on the 19th day of October, 1893, the following proceedings were had in said cause, to wit:

OXLEY STAVE CO. *et al.*
v.
BUTLER COUNTY, App.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court, and, upon motion, it is ordered by the court that the appellant be granted 10 days and the said respondents 10 days thereafter to file briefs.

And afterwards, to wit, on the 8th day of May, 1894, the further following proceedings were had in said cause, to wit:

THE F. G. OXLEY STAVE CO. and FREDERICK G. OXLEY, Trustee, Respondents,
vs.
THE COUNTY OF BUTLER, IN THE STATE OF Missouri, *et al.*, Defendants; The County of Butler, in the State of Missouri; The St. Louis, Iron Mountain and Southern Railway Company, and The St. Francis Lumber Company, Appellants.

Appeal from Circuit Court, City of St. Louis.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here now, being sufficiently advised

of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid by the said circuit court of the city of St. Louis rendered, be reversed, annulled, and for naught held and esteemed as to said appellants, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said circuit court of the city of St. Louis for further proceedings to be had therein in conformity with the opinion of this court herein delivered, and that the said appellants recover against the said respondents their costs
172 and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1893.

F. G. OXLEY STAVE COMPANY and FREDERICK G. OXLEY, Trustee for the F. G. Oxley Stave Co., Respondents,
vs.
THE COUNTY OF BUTLER *et al.*, Appellants.

This is a suit in equity to set aside a decree in favor of Butler county rendered at the July term of the circuit court of Butler county in 1869, and to cancel certain deeds and patents, among them a patent from said county to the St. Louis, Iron Mountain & Southern Railway Company, dated December 10, 1874, and to quiet the title to the lands mentioned in the decree and said several deeds and patents. The lands in controversy are swamp lands and were conveyed by the Secretary of the Interior to the State under the act of Congress of Dec. 28, 1850 (9 U. S. Stat. at Large, page 519). The following acts of the legislature of Missouri relating to said lands were passed: March 3d, 1851: "An act donating certain swamp and overflowed lands to the counties in which they lie" (Session Acts 1850 and 1851), which act did not apply to Butler and some other counties in the southeast, but on the 23d day of February, 1853, the provisions of the act of 1851 were extended to them. (Session Acts 1852 and 1853, page 108.)

February 24, 1853: An act to authorize the formation of railroad associations and to regulate the same (Session Acts 1852 and 1853, p. 121), sections 29 and 32 of which are as follows:

SEC. 29. "It shall be lawful for the county court of any
173 county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act of this State; and the county court or the city council subscribing or proposing to subscribe to such capital stock may for information, cause an election to be held to ascertain, the sense of the tax-payers of such county or such city, as to such subscriptions, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

SEC. 32. "Any county subscribing for railroad stock which shall

have internal improvement funds or overflowed or swamp lands granted to it by the State, may apply such funds or mortgage or sell such overflowed or swamp lands to pay such subscription or any part thereof, and provide for the remainder, if any, by the tax as aforesaid."

December 7, 1855: "An act to enable certain counties (Butler among the number) to transfer swamp, wet, and overflowed lands to the Iron Mountain or Cairo and Fulton Railroad Company whenever a majority of the voters of either of said counties shall petition the county court to do so. (Session Acts 1855, page 353.)

December 10, 1855, 16th section of which is as follows:

SEC. 16. "It may be lawful for any county court of any county in this State, having overflowed and swamp lands, to subscribe the same as stock to any railroad which may pass through such county upon such terms and to be valued at such price, as may be agreed upon by the county court and the directors of the railroad company in which such stock may be taken." (Session Acts 1855, page 477.)

A district county court was established — act of March 1, 1855, which act provided that the court should "possess all the powers and perform all the duties that the respective county courts now possess or may perform in the counties of Stoddard, Dunklin, and Butler." (Session Acts 1855, page 474.)

The following orders looking to the disposition of said lands were made by the county and district county courts respectively: In the county court of Butler county, July 24, 1854: "Ordered
174 by the court that the clerk open columns on the poll books for the purpose of taking the vote of the people for and against the county taking stock in the railroad." In the county court of Butler county, October 24, 1854: It appearing to the satisfaction of the court that qualified voters of said county are in favor of subscribing $50,000.00 to the Cairo and Fulton railroad, it is hereby ordered by the court that the aforesaid amount of stock be subscribed, payable out of the proceeds of the sale of swamp lands, and it is ordered that Daniel L. Jennings be appointed as agent to subscribe said stock and attend the interests of said county in said railroad company, and that a warrant be drawn upon the treasure of this county in favor of the president of said railroad company for $2,500, payable out of swamp-land fund, to pay the five per cent. upon the amount of stock subscribed.

Afterwards, on December 6th, 1855, the district county court made an order reciting the county clerk's order and that the railroad was willing to take the swamp lands at $1.00 per acre, and ordered that when the lands were selected that Daniel Jennings make deeds to the railroad and represent the county in voting the stock, and on the same day this district court subscribed $50,000 more to the capital stock to be paid for by the alternate sections of swamp lands at $1.00 per acre.

Afterwards, on March 5th, 1856, Solomon Kitchen and H. H. Bedford, agents for the railroad, presented their report of their selection of swamp and overflowed lands amounting to 100,119.94 acres. At the same term the court ordered the clerk to certify to

the register of lands at Jefferson City that full payments had been made by the railroad company, with a list of the lands. After the receipt of the clerk's certificate and on the 20th day of April, 1857, the governor issued a patent to the railroad company for said lands, which patent recites that it is made pursuant to the act of December 7, 1855.

On the 23d day of May, 1857, the Cairo and Fulton R. R. Co. executed a deed of trust upon the lands in controversy and
175 other lands to secure the payment of 1,600 bonds of $1,000.00 each to Waterman, Moore, and Wilson, which deed was recorded in Butler county, December 15, 1859. On October 1, 1866, the Cairo and Fulton R. R. Co. was sold under what is commonly called the "sell-out" act, passed February 19, 1866, amended by the supplementary act of March 19, of the same year, the 8th section of which provides that "nothing in this act shall be so construed as to convey or to authorize the commissioners to convey to the purchasers of the Cairo and Fulton R. R. any of the lands subscribed by the counties to the stock of said road."

December 16th, 1871, Chas. P. Chouteau, having been the owner of some of the bonds of said railroad company, filed his petition in the Mississippi county circuit court against Thos. Allen *et al.* to foreclose said deed of trust, and in the supreme court of Missouri a decree in said cause was rendered in favor of said Chouteau, and, as directed in said decree, the lands in controversy with other lands were sold by a special commissioner of this court, Mr. Chouteau becoming the purchaser thereof, and on December 19th, 1886, he sold said lands, together with a large quantity of other real estate, to the F. G. Oxley Stave Company and conveyed the same to F. G. Oxley, trustee of said company. On the trial plaintiff- offered in evidence a certified copy of the record and proceedings in said cause presumably as a former adjudication of the matters now in controversy. On November 7, 1866, Butler county filed in the circuit court of that county its petition against the Cairo & Fulton Railroad Company and the said Moore, Wilson, and Waterman, trustees, to cancel and set aside the patent from the State to the railroad company and the deed of trust from the said railroad to the trustee.

Service was had upon Green L. Poplin, the president of the Cairo and Fulton railroad, and upon the defendants Moore, Wilson, and Waterman, by publication.

The files of this cause are lost. The record offered consisted of the affidavit for publication, order of publication and the
176 publication itself as to the non-resident defendants, orders continuing the cause, which were pending about three years; judgment by default against defendants at various times, recitals of the filing of demurrer, and the decree itself annulling the patent made by the governor to the railroad company, and the deed from the railroad company to Moore, Waterman, and Wilson, trustees, and all right, title, or interest acquired by them in and to said lands, and revesting the same in Butler county. It now appears that Waterman, one of the trustees, had previously died at Philadelphia, Pennsylvania, in February, 1862, and that John Moore,

another trustee, had died in Boston, Massachusetts, September 23, 1866.

In this connection plaintiffs read in evidence an extract of order No. 50 of the board of trustees of the railroad company, reciting the death of Mr. Waterman and an appointment by John Wilson of Mason Brayman to succeed said Waterman as trustee, of date March 22, 1866. Defendant objected to this paper on the ground that it was hearsay, and that John Wilson was not a majority of said board and could not make said appointment.

Plaintiffs offered another paper-writing, signed by Waterman, Moore, and Wilson, appointing Brayman, of Springfield, Ills., president of the board of trustees, of date May 7, 1858.

Plaintiffs also read in evidence an appointment by the board of directors of the Cairo and Fulton R. R. Co. of Henry H. Bedford as trustee to succeed John Moore, deceased, which appointment was made April 11th, 1867, at Bloomfield, Mo., and was attested by Green L. Poplin, president, &c., and T. W. Johnson, secretary.

The record recites the appearance of the defendants. The files being lost, John W. Emerson, the attorney who represented Butler county in obtaining the decree, testified that the firm of Bedford and Owen and Mr. Chapman appeared generally for the defendants and produced a copy of a motion to strike out the second amended petition, as follows:

"BUTLER COUNTY
vs.
177 CAIRO & FULTON RAILROAD COMPANY, A. G. WATERMAN, JOHN MOORE, *et al.*

In Butler County Circuit Court.

Now come the defendants and moves the court to strike out the plaintiff's second amended petition herein for the following reasons:

1. Because said petition contains scandalous matter.
2. The allegations herein are impertinent, redundant, and immaterial.

(Signed) BEDFORD, OWEN & CHAPMAN,
Attorneys for the Defendants.

Filed October 2, 1868.
(Signed) ISAAC V. TUBB, *Clerk.*"

Also a copy of a demurrer as follows; which copy Mr. Emerson testified he made at the time from the files and found among his papers.

"COUNTY OF BUTLER, STATE OF MISSOURI, Plaintiff,
vs.
THE CAIRO AND FULTON RAILROAD COMPANY, JOHN MOORE, JOHN WILSON, and ALBERT G. WATERMAN, Defendants.

In the county of Butler, at the March term of the circuit court of said county, A. D. 1867, the defendants come and demur to the plaintiff's petition for the following reasons, to wit:

1. There is a misjoinder of parties herein.

2. There are parties included in this suit who occupy entirely different positions.

3. The plaintiff states that the governor, pretending to act as the agent for plaintiff, wrongfully and illegally conveyed by deed to said Cairo and Fulton Railroad Company 100,868.56 acres of land and does not make profert of said deed or make any
178 excuses therefor.

4. Plaintiff states that on the 23rd day of May, 1857, said Cairo and Fulton Railroad Company conveyed said lands to John Moore, John Wilson, and A. G. Waterman without making profert of said conveyance, or any excuse therefor.

(Signed) BEDFORD AND OWEN,
Attorneys for the Defendants."

Mr. Chapman, an attorney, testified that he was employed to aid in the defense of the action brought by the county to cancel the deeds and patents. James H. Vail was the judge before whom the case was tried. Judge John W. Emerson and Ira E. Leonard represented the county. Bedford had been acting as a director of the company, and employed witness. Bedford was present in court when the cause was tried. Witness took no part in the final hearing because Bedford and Poplin had agreed to get his fee, and, failing to do so, he notified them he would not appear, and when the case was called he took no part in it. He remembered arguing motions and a demurrer for the defendants.

The contention of respondents is that the orders of the county and district courts aforesaid and the patents of the governor of the State made in pursuance of them operated to transfer the title of said lands to the Cairo and Fulton R. R. Co., and the decree of the Butler circuit court was void because fraudulent and for want of necessary parties, while appellant insists; first, that in attempting to dispose of the lands said courts did not comply with the laws, but disregarded its requirements; second, that whatever color of title the railroad company had was removed by the decree of the Butler county circuit court.

Other facts will appear in the discussion in the opinion.

But two questions are presented by the record for determination in this court:

First. Were the subscriptions by the county courts (county and district) of Butler county to the stock of the Cairo and Fulton Railroad Company and the conveyance of the swamp lands
179 of that county to said railroad in satisfaction of said subscriptions authorized by law?

Second. Ought the decree of the circuit court of Butler county annulling the conveyance of said lands be set aside for the reasons urged by the plaintiffs, to wit: First, because procured by fraud, and, second, because two of the defendants named in it were dead at the time of its rendition, and the railroad company a dissolved corporation?

Unless the decree is vacated, it will be unnecessary to enter upon the discussion of the power of the county court to subscribe to the stock and convey the lands in payment for it, for if it be conceded that the subscriptions were lawful on their face and the patents and deeds sufficient in form, still if they were obtained by fraud as found and adjudged in the decree of the circuit court, they become inoperative as if they had never been.

This, too, is the theory upon which the petition proceeds.

The primary purpose of the suit is to remove the cloud which this decree cast on plaintiffs' title.

The attack upon the decree is twofold.

The contention is that it was obtained by fraud and collusion and lest the evidence might be insufficient to satisfy the chancellor on this point, it is urged that the decree is void in law because rendered against two dead men and a dissolved corporation. As to the proposition that the judgment was procured by fraud, the burden is assumed by the plaintiffs to establish that the judgment was fraudulently obtained.

Perhaps there is no subject upon which the decisions of this court have been more uniform than those in regard to the character of evidence required in courts of equity to vacate a final judgment. Beginning with Jones *vs.* Brinker, 20 Mo., 87, and coming down to Murphy *vs.* De France, 105 Mo., 53, it has been uniformly held that "the fraud for which the judgment may be vacated or enjoined in equity must be in the procurement of the judgment." "If
180 the cause of action be vitiated by fraud, this is a defense which must be interposed, and, unless its interposition be prevented by fraud, it cannot be asserted against the judgment." Freeman on Judgments (3 ed.), sec. 489; Lewis *vs.* Williams, 54 Mo., 200; Van Bibber *vs.* Julian, 81 Mo., 618; Murphy *vs.* De France, 101 Mo., 151.

Applying this test to the pleadings and evidence in this case, we have a final judgment rendered in a court of general common law and equity jurisdiction as long ago as 1869. That court unquestionably had jurisdiction of the subject-matter and the parties litigant, so far as appears by the recitals of the judgment itself. To avoid this judgment it is claimed that it was obtained by collusion and the pretended appearances of counsel. To sustain this charge the evidence shows that this cause was pending for nearly three years; that service was obtained upon Green L. Poplin, the president of the Cairo and Fulton railroad, by his acknowledgment of service upon the writ; that orders of publication were duly made and published against the defendants Moore, Wilson, and Waterman, the trustees. It appears that the files of the case are now and were lost long prior to the commencement of this suit, but Judge

Emerson, who brought the action for Butler county, produced on the trial a certified copy of a motion signed by Chapman, Bedford, and Owen, in which they appeared for defendants generally, and moved to strike out the plaintiff's petition, also a general demurrer.

Mr. Bedford, a witness for plaintiff, whose name as attorney was signed to these pleadings, was shown to have been present in open court when this cause was heard, and, according to his statement, as a friend of the court remonstrated against the court proceeding to judgment because the trustees were not in court. His testimony negatives all idea of collusion between Judge Emerson and his firm of Bedford and Owen, who represented the defendants. There were also charges by innuendo that Emerson's brother had made a deed to Mr. Chapman to show that Chapman was consenting to the decree, but the evidence of Chapman was that Bedford and
181 Poplin had promised him a fee, and, relying upon their assurances that they would get it, he did appear with the defendants along with Bedford and Owen, but as they neglected to pay him, he notified them six months before the trial that he would appear no further, and though present in court took no part in the trial.

The attempt to show that Mr. Chapman received any of this land as a consideration for assisting in or permitting this judgment we think entirely failed.

As to the other evidence, it appeared that Emerson did not know either of the trustees and knew nothing of the death of Moore or Waterman, and *and* proceeded upon the idea that they were both alive and that they had entered their general appearance by counsel.

The evidence tending to prove that the judgment was procured by any fraudulent practices is entirely too meagre to sustain the judgment of the circuit court in setting it aside.

As was said in Picot, adm'r of Dillon, *vs.* Bates *et al.*, 47 Mo., 390, "More than twenty years have elapsed and we are called upon to say that the judgment regularly entered and long acquiesced in should be impeached for fraud because merely the consistency of the account adjudged cannot now be shown."

But the court will not assume fraud after so long a time from mere obscurity. When it is considered that this judgment had been rendered two years before the action had been commenced in Chouteau *vs.* Allen, and that the attorneys of Chouteau in that case were cognizant of its existence at that time, this long delay in attacking it should be explained by plaintiffs. It is to be assumed that an abstract of the title would have disclosed it to plaintiffs when they bought these lands.

Moreover, Bedford claimed to have been duly appointed as trustee of these lands in 1867. He says he was in court when this decree was rendered. He was a member of the bar and a trustee of this fund, and the statute gave Wilson, his cotrustee, three years as a matter of right to move to set aside this judgment, and yet,
182 knowing and feeling an injustice was being perpetuated, he remained silent.

It is significant that Bedford at no time suggested the death of the trustees, Moore and Wilson, to the court.

They were non-residents of this State. The evidence now discloses that one died in Boston, the other in Philadelphia. There is not a word of evidence tending to show that Judge Emerson had the slightest notice of the death of either, and the inference of fraud on this account is without support.

The conduct of Bedford is much harder to explain. He was a member of the bar. He claimed to have been a substitute trustee. He knew the object of this suit, and, instead of contenting himself with acting as an *amicus curiæ*, he should have suggested the death of his predecessor, Moore, and asked to be made a party defendant and defend the trust which he now claims had been confined to his keeping, and not permitted Judge Emerson and Mr. Leonard, the counsel for the county, to proceed on the idea that Moore and Waterman were both alive.

He owed this to the court of whose bar he was a member, and he owed it to the beneficiaries of the trust he had assumed; but his laches in nowise attaches to the court and opposing counsel, both of whom were ignorant of the facts. The other evidence shows that a trial was had in open court which consumed some hours or more in putting in the evidence.

Nothing was hid from public view. The case was on the docket for three years, with the knowledge of the president of the railroad and the personal knowledge of Bedford, who claimed to be one of the trustees.

To permit a decree to be vacated on the loose recollection and uncertain memory of witnesses after twenty years would establish a most hurtful precedent. Heffernan *vs.* Howell, 90 Mo., 344.

Accordingly, we hold that plaintiff failed to show the decree of the circuit — of Butler county was fraudulently procured.

183 II.

Ought the judgment be set aside because Moore and Waterman were dead when it was rendered? In order to secure certain bonds issued by it, the Cairo and Fulton railroad, on May 23rd, 1857, by its deed of trust conveyed the lands which it obtained from Butler county, together with other lands, to John Moore, John Wilson, and A. G. Waterman, in trust to secure the payment of the bonds of said Cairo and Fulton Railroad Company, therein described, which said deed of trust was recorded in Butler county, Missouri, December 13th, 1859.

This trust deed, after reciting the purpose for which it was made, "grants, bargains, and sells unto said John Moore and John Wilson and A. G. Waterman, trustees, and unto the survivor or survivors, successor and successors of them forever all and singular said lands therein described."

The eight- clause of the said deed of trust is as follows:

"That for the purpose of continuing and securing the due execution of the trust hereby created, it is declared that all vacancies

that may occur in the office of trustee by death, resignation or otherwise, shall be filled, thus—the first vacancy shall be filled by a majority of the members of the board of trustees as constituted, being in office at the time such vacancy shall take place—the next vacancy shall be filled by the said parties of the first part, and so on, alternately, until the end; and trustees so appointed, shall fill the term and *succeed* to perform all the duties and have all the power hereby conferred upon the members of the board of trustees herein named and provided for. They shall constitute and appoint of their own number, or otherwise, a president of this board of trustees who shall be a member thereof; and who shall hold his office for such time, and have and exercise such powers and duties as they may confer and appoint, as fully and with like effect as if herein expressed. Such other officers and agents as shall be necessary to the execution of this trust may be ap-
184 pointed in such manner as they may determine—rate of compensation fixed and such rules and regulations made and carried into effect, as they may deem necessary."

Plaintiff- read in evidence, over the objection of defendants, the following paper:

OFFICE OF THE BOARD OF TRUSTEES OF THE CAIRO & FULTON R. R. OF MISSOURI, *March* 22, 1866.

Under authority of the power vested in us by the certain deed of trust executed by the Cairo & Fulton R. R. of Missouri, dated May 23d, 1857, we, as surviving and remaining trustees, hereby appoint and constitute Mason Brayman, of Illinois, a trustee to fill the vacancy caused by the death of Albert G. Waterman, original trustee named in said deed. Witness our hand- and official seals the day above written.

[B'd of Trustees' Seal, C. & F. R. R. Co.]

(Signed) JOHN WILSON, *Trustee.*
MASON BRAYMAN, *Trustee and Pres.*

And a similar paper signed by the three trustees appointing said Brayman president of the board of trustees. Neither of these papers were acknowledged or recorded in the recorder's office of Butler county, nor was there any evidence that Butler county or its attorneys had any notice whatever of said appointments.

A similar appointment of Henry H. Bedford, of date April 20, 1867, by the board of directors of the Cairo and Fulton Railroad Company, signed by its president, Green L. Poplin, was read in evidence over the objection of the defendants.

No notice of this appointment was given defendant-, and said substitution was not recorded in the county of Butler. It is claimed by plaintiffs that the Cairo and Fulton railroad was dissolved by the sale thereof under the "sell-out" act of the General Assembly of February 19th, 1866.

185 Whereas defendants insist that by the very terms of that act these lands were not affected, the proviso of said act

being: "Provided, that nothing in this act shall be so construed as to convey or authorize the commissioners (appointed thereunder) to convey to the purchasers of the Cairo and Fulton R. R. Co. and of the lands subscribed by counties to the stock of said road;" and that for the purposes of its unsettled liability to the counties subscribing said stock it was still a corporation. In this connection the act of March 21st, 1868, is invoked by plaintiffs as a confirmatory act, and by defendant- as recognizing the right of the several counties in these lands.

That act is entitled "An act for the final settlement of the Cairo and Fulton Railroad Company, and to provide for the payment of all just claims made prior to May, 1862, and to distribute the unappropriated stock." By this act the legislature authorized the county courts that took stock in the Cairo and Fulton R. R. to appoint agents to look after their interests and require the old company to turn over to them all lands undisposed of by the company, and after selling such lands as were necessary to pay certain claims to "turn over the remaining unappropriated lands to the several counties to which it originally belonged." (Acts 1868, p. 92.)

It appears by the evidence of H. H. Bedford that this company held annual elections in 1865 & 1866 & 1867 and elected officers, and it was by this board so elected he was appointed trustee in this deed of trust, in April, 1867.

Under this state of facts plaintiffs insist that the Cairo and Fulton Railroad Company was dissolved and its board of directors were not made defendants; its property is not bound by decree, and Moore and Waterman being dead and their successors, Brayman and Bedford, not having been made defendants, the trust fund in these lands could not be affected. On the part of defendants it is maintained that as the corporation was served through its presi-
186 dent it was in court, and that by the terms of the deed of trust, upon the death of Moore and Waterman, Wilson, the surviving trustee, took the trust estate by survivorship, and, as he had been duly served, the decree bound the whole trust estate and cannot be held void after great lapse of time.

Counsel for plaintiffs have referred to the decision of this court in Chouteau *vs.* Allen, 70 Mo., 327, but as the decree of the circuit court of Butler county was rendered some two years before the action was commenced in Chouteau *vs.* Allen, and as none of the defendants in this case were parties in that action or are claiming under any party to that action, it is very plain that they are not estopped by the judgment in Chouteau *vs.* Allen. Indeed, the learned counsel for plaintiffs concede this in their brief.

The record is entirely silent as to when Chouteau acquired the bonds which were the basis of his action against Allen, and there is no evidence that he owned any of those bonds when the suit of Butler County *vs.* The Railroad Company and the trustees was commenced in 1866, or, for that matter, that said bonds had been issued to any one at that time. It is conceded by plaintiffs that it was not necessary to make the bondholders, if any, parties to the said suit to set aside the deed of trust; that if the trustees were

made parties and notified, that was sufficient. This is the undoubted rule in trusts of this character. Whatever binds the trustee in proceedings to enforce the trustee binds the bondholders, and whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. Kerrison *vs.* Stewart, 93 U. S., 155–'60; Richter *v.* Terome, 123 U. S., 233; Shaw *vs.* Railroad, 100 U. S., 605; Jones on Railroad Securities, sec. 363 & 438.

Leaving out of view for the present the power to substitute successors to those of the trustees that might die, it is unquestioned that, in the absence of provisions in clause eight of the deed of trust, upon the death of Waterman and Moore the trust devolved upon Wilson as sole surviving trustee. This was the rule at com-
187 mon law, and was unaffected by our statute abolishing joint tenancy in certain cases. General Stats. 1865, ch. 108; 12 R. S. 1855, S. 13, p. 357; Stewart *v.* Pettus, 10 Mo., 468; Lewin on Trustees, p. 50; 1 Perry on Trustees, sec. 343; 1 Lewin on Trustees, secs. 261 & 262.

But it is urged that upon the death of Waterman Brayman was appointed his successor. This presents a proposition not without difficulty.

If Brayman was not a trustee in whom this title was vested prior to Waterman's death, then it — clear that Wilson alone was not empowered to appoint him, because it required a majority of the board to make the appointment, and if he was not a member he could not participate in the appointment of himself.

If, on the other hand, he was already a member, what was the purpose of appointing him anew? Again, this appointment, if made, was made in Springfield, Ill. If plaintiff is right it was an instrument in writing substituting a trustee who thereby became seized of the title to real estate in Missouri. This writing was not acknowledged and recorded in this State, and no one dealing with said lands was chargeable with notice of such substitution, and it is not claimed the county had such notice.

But, as already stated, the plaintiffs now say that the circuit court's decree should be set aside because Brayman and Bedford were not made parties defendant.

It is well to bear in mind that this objection on that decree is not made by any one who was a party to it when it was rendered or had any interest at that time that could be affected by it. This attack is made by one who was and is a stranger to that suit twenty years after its rendition. In State *ex rel.* Carter *vs.* Clymer, 81 Mo., 122, this court approved the statement in Freeman on Executions, section 75, to the effect that "none but the parties to a suit will be allowed to interfere with its management, and that none but the parties to the writ who are liable to be injured by it can complain of the irregularity by which it may — infected." Ellis *v.* Jones, 51 Mo., 160.

188 But if it be said that as a purchaser from one who purchased the lands under the judgment of Chouteau *vs.* Allen plaintiffs have a right to attack this judgment, the answer is that the sale under the decree in Chouteau *vs.* Allen was made by a

special commissioner, John H. Fisse, appointed by this court, and not through Brayman and Bedford or either of them, and any title Mr. Chouteau obtained did not rest upon a recognition of Brayman or Bedford as trustee by this court. Neither the Cairo and Fulton Railroad Company or Wilson, Bedford, or Brayman have in all these years sought to avoid that judgment, and a stranger to that judgment ought not and will not be allowed to complain that all the necessary parties were not before the court.

The suit was commenced and prosecuted against the parties in whom the record title appeared at the time.

Moreover, in voluntary or express trusts no title vests in the proposed trustees, by whatever instrument it is attempted to be transferred, unless he expressly or by implication accepts the office or in some way assumes its duties and liabilities." 1 Perry on Trusts, sec. 259; Armstrong *vs.* Morrill, 14 Wall., 138; Roberts *v.* Moseley, 51 Mo., 282.

It is not a violent presumption in favor of the judgment of a court of general jurisdiction to presume that it sufficiently appeared to the circuit court of Butler county that neither Brayman or Bedford had ever accepted the trust or performed any action in regard to its execution from which their acceptance could be presumed, and certainly we find nothing in this record which could rebut a finding by the circuit court that they had disclaimed said trust—Brandon *vs.* Carter, 24 S. W., 1035—and in such a case the court might have dispensed with the necessity of bringing them in. Story Eq. Pl. (1892, 10 ed.), S. 214*a*.

As to Bedford, it would be utterly unconscionable to permit him at this late day to open up said proceedings in view of his knowledge and testimony; but if plaintiffs are right that the corporation was dissolved by the "sell-out" act of 1866 nothing can
189 be more conclusive than that Bedford was not a necessary party, because, according to their own showing, he was not appointed a trustee until 1867; on the other hand, if the railroad company was not dissolved, it is clear that, having appeared as counsel of record in that case for Wilson, trustee, and for the company, he is estopped by his conduct in not suggesting his appointment as trustee, and so are those who claim under or through him. It results that, in our opinion, the showing is sufficient to justify the circuit court in setting aside the judgment of the circuit court of Butler county, because they were not parties defendant, as asked by plaintiffs.

The remaining ground for vacating that judgment is that "the president and directors" of the Cairo and Fulton Railroad Company, as such, were not made defendants after its dissolution. Again, bearing in mind that the action in favor of Butler county was commenced in 1866, and that at the time of the decision in Moore *vs.* Whitcomb, 48 Mo., 543, had not been rendered, and that the general appearances of the company had been entered by the president of the company and no decree of dissolution had been rendered against it, it is not at all strange that the circuit court

should have proceeded against the corporation through its chief officer.

The State has expressly reserved these swamp lands from the operation of the "sell-out" act, and the title to them remained in the corporation in trust for its creditors and stockholders. The mere insolvency of the corporation, the sale of the larger portion of its assets, and its inability to proceed with the purposes of its incorporation would not necessarily work a dissolution. Hill *v.* Fogg, 41 Mo., 563; State Nat. Bank *vs.* Robidoux, 57 Mo., 446; Kansas City Hotel Co. *vs.* Sauer, 65 Mo., 279.

The decision of Moore *vs.* Whitcomb, 48 Mo., was upon demurrer only. Whether the court, with all the facts and the provisions of the "sell-out" act before it, would have held the corporation dissolved for all purposes, we greatly doubt, but it is clear that
190 the president, Poplin, was in court, and no suggestion of dissolution was pleaded; and if the corporation was dissolved, the failure to proceed against the president and directors as trustees was simply an irregularity that could have been amended if seasonably prayed, but it is no ground now for vacating said judgment after this lapse of time at the instance of one who was neither a creditor nor stockholder at that time.

In Dunklin County *vs.* Chouteau, division No. one of this court at the last term held that the great delay of Dunklin county in seeking to avoid the patent under which Mr. Chouteau held the lands of that county barred the county.

In this case it appears that Butler county, as soon as the condition of society after the war would permit, began its action and repudiated the means by which it had been deprived of this great body of valuable timber lands. It proceeded in a court of general jurisdiction. The action was pending for three years. It was determined in open court. No secrecy marked the proceedings, and a final judgment was rendered in 1869 decreeing that these lands had been obtained by fraudulent practices.

That judgment had stood unimpeached directly or indirectly until this action was commenced, a lapse of about 20 years. If the laches of Dunklin county deprived her of relief, certainly the diligence of Butler county should be rewarded, and Butler county may invoke the reasoning of the Dunklin county case, *supra*, and insist that the laches of those claiming those lands adverse to the county has estopped them from attempting to annul the judgment by which these lands were restored to the county. Our conclusion is that the judgment of the circuit court should be reversed and the cause remanded with directions to the circuit court to enter a decree dismissing the bill of plaintiffs.

All of this division concur.

JAS. B. GANTT, *Judge.*

191 And afterwards, to wit, on the 15th day of May, 1894, the further following proceedings were had in said cause:

OXLEY STAVE CO. *et al.*, App.,
v.
BUTLER CO., Resp.

Comes now the said respondent, by attorney, and files its motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1893, Division No. 2.

F. G. OXLEY STAVE COMPANY *et al.*, Respondents,
vs.
COUNTY OF BUTLER *et al.*, Appellants. } No. 6170.

Motion for Rehearing.

Motion of respondents for rehearing.

Now come the respondents in the above-entitled cause and move for a rehearing thereof upon the ground that the court has overlooked the following questions decisive of the case, which were duly submitted by counsel and were fully presented by the abstract on file, to wit:

1. The court ignores the nature of the proceeding. The petition is a bill in equity filed by a party who has itself or by its grantors been in the actual or constructive possession of the lands involved since 1857, the date of the State patent, to quiet its title as against parties out of possession who claim an adversary interest, but have not for seventeen years asserted such interest.

2. The court imputes laches to a party in possession who has failed to quiet his title as against parties out of possession who had not up to the time of filing this suit done any act to require
192 action on the part of the plaintiffs, and who have, so far as the record shows, for a long time recognized and allowed the title of the plaintiffs to be good.

3. The court refuses to impute laches to a defendant who for twenty years after a decree is rendered adjudging that it is the owner of the land omits to assert its rights, recognizes its adversary's grantee as owner, and assesses against and collects taxes from him for such period, and for all other practical purposes abandons its rights under the decree.

4. The court erroneously assumes that a party in possession is bound within any period known to the law or to equity to institute proceedings to quiet his title.

5. The court fails to realize what the record clearly shows, that a decree which is inoperative because indispensably necessary parties were not before the court does not become operative by lapse of time, and that such decree, especially at the instance of one in possession of the lands involved and who had enjoyed such possession for at least twenty-five years under a party to the suit in which such de-

cree was rendered, ought to be declared inoperative as soon as such defect of parties is suggested.

6. The court assumed that the respon lent is not in privity with the defendant in the suit of Butler County *vs.* The Cairo and Fulton Railroad Company, and therefore is not in position to have the decree therein vacated, whereas it appears by the record that the respondent's title is derived, through the medium of the decree of foreclosure in the suit of Chouteau *v.* Allen and others, directly from the Cairo and Fulton Railroad Company, whose directors and trustees were made parties defendant in said foreclosure proceeding.

7. The court assumes that respondent has alleged the defect of parties, "lest the evidence with respect to the main charge of fraud might be insufficient to satisfy the chancellor," whereas it
193 appears by the pleadings and by the brief and arguments of counsel that the charge of fraud was distinct from and independent of the point made with respect to the defect of parties, and that upon the latter ground alone, absolutely independent of the former, the decree should be vacated.

8. The court omits to take into consideration the uncontradicted evidence in the record that no pleading was in fact filed on behalf of either the railroad company or the trustees in the suit of Butler County *v.* The Cairo and Fulton Railroad Company, and assumes such fact, notwithstanding the admissions of Chapman and the testimony of Bedford that neither they nor Owen ever pretended to appear either for the trustees or for the railroad company.

9. The court, while admitting, for the purpose of its opinion, that the title to the lands involved was in November, 1866, well vested in the Cairo and Fulton Railroad Company, ignores this fact when it comes to judgment, and assumes that the court in the case of Butler County *v.* The Cairo and Fulton Railroad was justified in annulling that title on the ground of fraud, while the evidence here introduced shows, and Emerson frankly admits, that no evidence whatever was introduced to establish the charge of fraud, and that his effort was confined at the hearing to an attempt to show that no vote of the tax-payers of the county was ever taken with respect to the stock subscriptions of the various counties. In other words, the court, while admitting, as was decided recently by the Dunklin county case in this court and formerly by the case of Chouteau *v.* Allen, that a vote was not necessary, justifies a decree finding fraud on the sole ground that a vote was necessary and was not in fact taken.

10. The court decides that the Cairo & Fulton Railroad Company had not been dissolved in 1866 by the sale under the sell-out act, ignoring the terms of the act, which provided not only that the property but the franchises of the railroad should be sold, and ignoring the contemporary decision in the case of Moore *v.* Whitcomb.

11. The court in deciding that Mason Brayman was not an indispensable party defendant in November, 1866, mistakes the
194 constitution of the board of trustees established by the deed of trust, and erroneously assumes that Brayman was incom-

petent to join in his own appointment, whereas the deed of trust shows (article 8) that the board of trustees consisted of the three original title trustees and a fourth person appointed by them, "of their own number or otherwise," and the record of the trustees shows that Mason Brayman was in 1858 duly appointed a member of the board of trustees by an order signed by all of the title trustees, and it appears further by the eighth article of the deed of trust that not the three title trustees, but a majority of the board of trustees, of which board Mason Brayman was a duly constituted member, were empowered to fill a vacancy in the office of title trustee. Brayman prior to 1866, although not a title trustee, was a member of the board of trustees and, as such, was in 1866 authorized by the deed of trust, in conjunction with the surviving title trustees, to join in an appointment to fill a vacancy. When, therefore, the appointment of March 22, 1866, was made the board of trustees consisted of Wilson, Moore, and Brayman, Waterman having died in 1862. A majority of these three was by the deed of trust authorized to fill the vacancy. Wilson and Brayman constituted at that time such majority and were, according to the deed of trust, authorized to appoint Brayman title trustee in lieu of Waterman. The mode of Brayman's appointment the court misconceives, and to such misconception is due its view with respect to the validity of his appointment.

12. The court ignores section 19, page 329, of the Revised Statutes of 1865, which provides that upon the dissolution of a railroad company its directors shall be trustees to wind up its affairs, "with power to sue and be sued as such trustees." No one of the directors *were* joined as defendants in the Butler County case.

13. The court misconceives the effect of the section of the sell-out act which exempts from sale the swamp lands conveyed by the counties to the railroad. This section does not indicate an intention to keep alive a corporation, but to save from sale lands
195 which had prior to that time been conveyed by the company to secure its bonds.

14. The court misconceives the effect of an election which Bedford thought might have been held in 1867, since, if under the sell-out act the corporation had been dissolved, as was decided in Moore *v.* Whitcomb, an error of stockholders with respect to their rights could not have revived the corporation.

15. The court are in error assuming that because Bedford became in 1867 a trustee under the mortgage he was bound, although not made a party to the suit, to answer. He did what he could by protesting that proper parties were not before the court, and that some of the defendants were dead, thereby affording the court and the attorney for plaintiff an opportunity to avoid the error of proceeding to judgment without the presence of indispensable parties.

16. The court assumes that because Emerson was ignorant of the death of the trustees and of the dissolution of the railroad company that he should be excused from joining the successors of the one and the trustees of the other as party defendants in the suit,

although, as an attorney in the case, having notice of the provisions of the deed of trust and of the mode in which successors to trustees should be appointed, he was bound to inquire whether or not the original trustees survived, and he was also bound to inquire whether or not the corporation had become dissolved. He admits that he made no effort to procure such information, and when these facts were suggested by Mr. Bedford at the trial asserted that they were of no importance and proceeded notwithstanding.

17. The court has misconceived the plaintiffs' case, the nature and effect of the evidence introduced, the situation of the parties, and the law involved. It has taken land from a party who for many years has been in the exclusive and notorious possession of it, who had, according to the court's own admission, good
196 title through its remote grantor, the Cairo and Fulton Railroad Company, because a decree rendered in 1869 in a suit against two dead men and a dissolved corporation, wherein indispensable parties were not joined, declared without any proof whatever, according to the admissions of all parties and with the evidence in the record, and such title was fraudulently procured, notwithstanding the fact that for seventeen years no rights were ever asserted under said decree, and the party in whose favor it was rendered continued during all of that time to recognize the grantees of its adversary as the owners of the lands and assessed against and collected from them taxes from year to year.

18. The court decides upon points which were not made by counsel for appellants and which were not urged by them in argument or in their briefs—points which we have had no opportunity to meet, yet which might be fully met and overcome by the record.

All of which is respectfully submitted, with the attached brief more fully discussing the various questions raised.

GEORGE A. MADILL,
LIONBERGER & SHEPLEY,
Attorneys for Respondents.

And afterwards, to wit, on the 29th day of May, 1894, the further following proceedings were had in said cause:

OXLEY STAVE CO. *et al.*, Resp.,
v.
BUTLER COUNTY, App.

Comes now the said appellant, by attorney, and files its reply to the motion for rehearing heretofore filed by the said respondents.

Which said reply is in words and figures as follows, to wit:

In the Supreme Court, Division No. 2.

197 F. G. OXLEY STAVE CO. *et al.* } No. —.
vs.
BUTLER COUNTY *et al.*

Reply to Motion for Rehearing.

Respondent asks for a rehearing upon the grounds that this court has not learned the facts in the case and that it is ignorant of the law to be applied to its statement as to what these facts are.

Respondent has not complied with rule 20 in any particular. He simply states that the court has misapprehended respondent's position and the facts in the case; has held the facts in the case under advisement so long as to have (possibly) forgotten his argument, and that the decision is based upon points which were not urged by appellant.

The court needs no defense of its action from this appellant and has not deserved this attack from respondent.

Answer to Points.

Nos. 1, 2, 3, 4, 5, and 7 and 8.

Why did respondents bring this action?

If it had been in possession, actually or constructively, since 1857—if defendant Butler County has not asserted any adverse interest for seventeen years—why did respondent not let well enough alone? or why did it not bring suit to quiet title? If it answer that it preferred to go into equity because the cloud upon its title could not be removed by this statutory action, then it admits that such cloud is cast by an instrument or judgment which upon its face does not appear to be void, but needs extrinsic evidence to bring forth such character. Thereupon respondent proceeds to attack the judgment in the suit brought by Butler county in 1866; date of judgment, 1869. In this attempt, if they can show that the judgment is absolutely void upon its face, they prove themselves out of court; if they show it to be void otherwise, they must contradict the recitals of the judgment by some other part of the record in the case. As the remaining parts of the record intro-
198 duced into testimony produced no such contradiction of the record of the judgment, its recitals must stand unless the judgment be overthrown for fraud, fraud proven to have existed in the obtaining of that judgment and not in any other matter connected with the history of the transaction. That is a question which the court has directly passed upon; further argument would not be respectful toward this court. Therefore the respondent is reduced to this quandary: His choice must be, either to admit that he has attempted to contradict the records of the circuit court by parol testimony or that the judgment is void upon its face. The first cannot be done in either a court of law or in a court of

equity; the latter, when proven, demonstrates that he has no standing in a court of equity. We therefore must assume that the Cairo & Fulton Railway Company was duly brought into court, and the court (of competent jurisdiction) in that decree of 1869 adjudged that as a fact the company was existent, capable of being bound by a decree.

(6.) Which said Cairo & Fulton R'y Co. had no interest in said Butler County lands at that time, as this court has previously in its opinion decided and stated. If for the reasons already reviewed the judgment for Butler county in 1869 was not void, why should the C. & F. R'y Co. have been made a party to the Chouteau-Allen suit? What title had it to lose by this foreclosure suit? In whom was the title if it had not been revested in the county? Not in the company or its directors, but in the land trustees. See Wilson *vs.* Beckwith, —. Mr. Chouteau, purchasing at that foreclosure sale, claimed under the land trustees. The company had no kind of title except after the satisfaction of the bonds, the equity of redemption. The bonds had not been satisfied. In either event, Mr. Chouteau was not in privity with the county.

(8.) Misstatement of fact. The record does not show that no pleading was filed by the Cairo & Fulton R'y Co., but the contrary. If the record of a judgment be destroyed, its contents may be proven by parol; so as to other parts of the record—the filed. Emerson produced what he said was a copy of a demurrer, etc.

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(5.) Assume the premises which it lays down (the absence of indispensably necessary parties), and the conclusion is logical, provided the facts stated are true.

(9.) Is unfair to the court. In its opinion the court says it might be conceded that the Cairo & Fulton had a good title in 1857; yet if the judgment obtained in 1869 by Butler county be not impeached, if it be valid, then respondent cannot prevail. Then the opinion reviews the evidence and holds that the evidence is insufficient to sustain the charge of fraud in obtaining the judgment. After that it is immaterial upon what evidence the judgment was based. It must stand unless proven to be void; so proven by the record. It is passing strange that counsel should seek to attack by parol testimony the reasons given or alleged for that judgment. The decision of the circuit court of Butler county was not appealed from. If the Cairo & Fulton R'y Co. was regularly in court, though this court might believe the conclusions of that court as to fraud to have been erroneous, yet that conclusion is as binding upon the rights of the parties to that suit as if it had been rendered by the supreme court.

That question was then settled, as were settled so many vital questions against Dunklin county, by the suit which Mr. Nathaniel Murphy instituted against Judge Jonas Eaker in 1856.

(10.) The court did not "overlook" the decision in Moore *vs.* Whitcomb. It says that this was an opinion upon a demurrer which conceded a state of facts to exist which does not exist in this case, and the court evidently believes that it has the power to reach

a different conclusion, though the same state of facts had existed herein.

No. 7 answered in No. 9.

(11.) This point at least was sufficiently argued by respondent in his brief and the oral argument of his counsel. It has become somewhat tiresome—all of this grave and apparently serious argument upon the relative powers and rights of a man to make
200 a deed of trust, as president of a company, to three trustees, who elect him president of themselves and who is afterwards elected a member of that board by a vote cast by himself as president of the board, thereby by his own vote becoming a member of a board constituted by virtue of a power which he had himself executed. "The game is not worth the candle."

(14.) Why was that corporation made defendant in the suit under which Mr. Chouteau obtained whatever title he may now claim to have? The record of this court will show that in the case commonly termed Chouteau *vs.* Allen *et als.* The Cairo & Fulton R'y was made party defendant; that it filed an answer by "M. H. Tyrrell, its attorney," and that the decree is headed "Charles P. Chouteau *vs.* The Cairo & Fulton Railroad Company in Missouri," etc., and commences with a recital with regard to the appearance or non-appearance of all of the defendants.

What about the value of that decree as against a dead corporation and three trustees, two of whom had never been alive as trustees?

(15.) Bedford's value to respondent as a witness is about all that is passed upon in that part of the opinion referred to under this subdivision.

(16.) This court has decided more than once that a judgment in a suit for taxes against the last apparent record owner is sufficient to bind a grantee of that owner whose deed is not of record.

(13.) The court could not have agreed with counsel for respondent in their conclusion as to the exception of the swamp lands from the sale of the Cairo & Fulton railroad and all the property and franchises of the corporation. It might agree with division No. 1 in Wilson *vs.* Beckwith, *supra*, suggesting that at the most the legislature probably thought it had a lien upon those lands for its bonds issued to the company. It might construe the exception as division No. 1 construed the words "appurtenances" and "property,"
201 holding that the Congress lands (no swamp lands being involved) did not pass to the purchaser under the "sell-out" act. It might have even come logically to the conclusion which has been reached by elementary writers, for instance, Blackstone, Kent, and Professor John B. Minor, that the corporation had lost its franchises for non-user since 1861, and that its personal property had escheated to the State, its real estate had reverted to the donor, particularly if they should regard this exception and the act of March 21, 1868, as legislative declarations of forfeiture.

(12.) The court might kindly mention all of the various propositions of the law advanced by counsel for respondent and then dissent from the opinion of counsel upon them, thereby demonstrating that it had not ignored S. 19, p. 329, R. S. 1865. But those directors

could not have become trustees to wind up its affairs, though the corporation had become defunct, provided division No. 1 was correct in its holding as to the Congress lands (Wilson *vs.* Beckwith, *supra*), that those lands were set apart, the legal title thereto in the land trustees, and were not embraced within the term "property" of the railway company. The directors were authorized only to collect its assets, pay its debts, etc.; such assets as are ordinarily termed corporation property. The only proper parties defendant as to the company's interests (if it were dissolved) were the original land trustees, those properly substituted, or the survivor of the original appointees, together with the counties to whom they lands may have reverted. Waterman died in 1862. That vacancy was to be filled by a majority of the members of the board as at that time constituted, to wit, Moore and Wilson; a majority of two is two.

Moore died September 23, 1866. March 22, 1966, Waterman was elected by the vote of Moore alone, if he (Waterman) had no power to vote. April 11, 1867, the "board of directors of the Cairo & Fulton R. R. Co." elected Bedford a member of the board of land trustees. Respondent says (Brief, p. 22) that the corporation was extinguished. If so, Bedford's appointment was null and
202 void. Therefore, in 1867, at the beginning of the Butler County suit, there was no land trustee except Wilson, unless Brayman, as president of the board, by election of the board, had the rights and powers of a land trustee. This court has in a few words disposed of that contention; but counsel for respondent reply in their motion that Brayman, by election as president of the board of trustees, had the same powers in the administration of the trust and the election to fill vacancy as a title trustee; that he did not become a title trustee in 1858, but was clothed with the power to make himself a title trustee by his own vote (p. 20). This appears to be too frivolous to answer. In their brief (p. 18) S. 8 of the deed of trust is set out in full. Successors elected to fill vacancies in the board of title trustees shall "succeed to and perform all the duties and have all the powers" of the original member. The president after election became a member of said board, but he "shall hold his office for such time and have and exercise such powers and duties as they may confer and appoint, as fully and with like effect as if herein expressed." Therefore his powers and duties depended upon the terms of the order of the board.

At page 19 of respondent's brief the order appears. By it no duties are imposed on him and no powers conferred, except the right to draw a salary of $4,000.00 a year. Nowhere in evidence does it appear that any other powers were ever conferred or that any duty was ever imposed upon him.

Wilson had all the title in himself by survivorship. The decree of 1869 was valid.

The opinion of this court may or may not have a disastrous effect; that cannot change the principles of law and turn into facts the fictions of counsel for respondent. He appealed to the law. He has received it. His bill is dismissed, but he is still in possession of the lands (as he says). If division No. 1 decided in the Dunklin County

case that the doctrine of laches applies to a county, cannot he not plead against Butler county her laches of seventeen years,
203 should she bring suit to dispossess him? If Butler county has all the while possessed, used, and sold these lands, the injury to respondent arises not from the decision of this court, but results from a condition of affairs showing that the facts are not as he has stated them to be.

We would respectfully submit that Mr. Chouteau's grantees have no rights under the law greater than has Butler county; no right to call upon this court to change its decision upon questions of law, for the reason that it has not agreed with counsel in their effort to make a good title, the merits of which Judge Medill dared not assert in his argument in the Dunklin County case.

BUTLER COUNTY,
By her attorney, HENRY N. PHILLIPS.

And afterwards, to wit, on the 26th day of June, 1894, the further following proceedings were had in said cause, to wit:

OXLEY STAVE Co. *et al.*, Resp.,
v.
COUNTY OF BUTLER *et al.*, App.

Now, at this day, the court, having fully considered and understood the motions heretofore filed for rehearings herein, doth order that said motions be, and the same are hereby, denied.

And afterwards, to wit, on the 28th day of June, 1894, the further following proceedings were had in said cause:

OXLEY STAVE Co., Resp.,
v.
BUTLER Co. *et al.*, App.

Comes now the said respondent, by attorney, and files its motion to modify the judgment herein.

Which said motion to modify judgment is in words and figures as follows:

204 In the Supreme Court of the State of Missouri, Division No. 2, April Term, 1894.

F. G. OXLEY STAVE COMPANY and FRED. G. OXLEY, Trustee for F. G. Oxley Stave Company, Respondents,
vs.
COUNTY OF BUTLER *et al.*, Appellants. } No. 6170.

Now come the respondents in the above-entitled cause and show to the court that said suit was brought against the appellants and many other parties, all of whom were duly served with process, as the record shows; that final judgment was obtained against all of the defendants in the circuit court of the city of St. Louis; that of the defendants The County of Butler, The St. Louis, Iron Mountain

& Southern Railroad Company, and The St. Francis Lumber Company only appealed from the decree of said circuit court; that said last-named parties only are entitled to any benefit from the judgment of this court.

Wherefore respondents pray the court to modify its mandate so that the bill filed in said cause shall be dismissed as to appellants only, and that the judgment of the circuit court of the city of St. Louis shall stand against all other defendants therein against whom judgments have heretofore been obtained.

GEORGE A. MADILL,
LIONBERGER & SHEPLEY,
Attorneys for Respondents.

And afterwards, to wit, on the 30th day of June, 1894, the further following proceedings were had in said cause:

OXLEY STAVE CO., Resp.,
v.
BUTLER CO. *et al.*, App.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to modify the judgment herein, doth order that said motion be, and the same is hereby, sustained.

205 And afterwards, to wit, on the 14th day of December, 1894, the further following proceedings were had in said cause, viz:

F. G. OXLEY STAVE CO. *et al.*, Resp.,
vs.
THE COUNTY OF BUTLER *et al.*, App.

Now, at this day, there is filed in the office of the clerk of the supreme court of the State of Missouri a writ of error to reverse the judgment in the above cause allowed by Honorable David J. Brewer, associate justice of the Supreme Court of the United States; a citation, signed by said justice, directed to the said appellants, citing and admonishing them to be and appear at a Supreme Court of the United States on the 8th day of January next; an assignment of errors and a bond for costs in the sum of five hundred dollars.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, F. G. Oxley, trustee, and the F. G. Oxley Stave Company, as principals, and Charles P. Chouteau (of St. Louis), as sure*ties*, are held and firmly bound unto the St. Louis, Iron Mountain and Southern Railway Company, The County of Butler, State of Missouri, and the St. Francis Lumber Co. in the full and just sum of five hundred dollars, to be paid to the said The St. Louis, Iron Mountain & Southern Railway Company, the County of Butler, and the St. Francis Lumber Co., their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of December, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, — the supreme court of the State of Missouri, in a suit depending in said court between F. G. Oxley, trustee, and The F. G. Oxley Stave Company, respondents, and The St. Louis,
206 Iron Mountain and Southern Railway Company *et al.*, appellants, a decree was rendered against the said F. G. Oxley, trustee, and the F. G. Oxley Stave Company, and the said F. G. Oxley, trustee, and the F. G. Oxley Stave Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The St. Louis, Iron Mountain and Southern Railway Company, the County of Butler, and the St. Francis Lumber Co., citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within — days from the date thereof:

Now, the condition of the above obligation is such that if the said F. G. Oxley, trustee, and the F. G. Oxley Stave Company shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

F. G. OXLEY, *Trustee.* [SEAL.]
THE F. G. OXLEY STAVE CO., [SEAL.]
By F. G. OXLEY, *Prst.* [SEAL.]
CHAS. P. CHOUTEAU. [SEAL.]

Witness-:
W. B. HUNT.
H. H. HUGER.

Approved by—
DAVID J. BREWER,
Associate Justice of the Supreme Court U. S.

Jan'y 9th, 1895.

The initials "F. G." which precede the word Oxley in the foregoing bond were inserted before signing and delivering bond.

STATE OF MISSOURI, *sct:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and com-
207 plete transcript of the record and proceedings in the case of The F. G. Oxley Stave Company *et al. vs.* The County of Butler *et al.* as fully as the same appears of record and on file in my said office.

Witness my hand as clerk and the seal of said court hereto affixed. Done at office, in the city of Jefferson, this 7th day of February, A. D. 1895.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: Case No. 15,787. Missouri supreme court. Term No., 221. The F. G. Oxley Stave Company and F. G. Oxley, trustee, plaintiffs in error, *vs.* The County of Butler, The St. Louis, Iron Mountain and Southern Railway Company, and The St. Francis Lumber Company. Filed February 11, 1895.

166-648.

FILED.
FEB 23 1897
JAMES H. McKENNEY,
CLERK.

15,787.

STATEMENT AND BRIEF OF PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 221.

THE F. G. OXLEY STAVE COMPANY AND FREDERICK G. OXLEY, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF BUTLER, THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., AND THE ST. FRANCIS LUMBER CO.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

ISAAC H. LIONBERGER,
Attorney for Plaintiffs in Error.

BYRON S. ADAMS, PRINTER.

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STATEMENT.

This suit was brought on the 16th day of August, 1889, to the Ootober term of the circuit court of Butler County, Missouri, to vacate and annul a certain decree rendered by said court on the 2d day of July, 1869, and to determine and quiet the title to certain lands thereby affected with respect to the claims of the defendants founded upon said decree.

PETITION.

(Trans., p. 12.)

The amended petition alleges that certain lands therein described, amounting to about 100,000 acres, were granted by the United States to the State of Missouri, and by said State donated to the County of Butler; that thereafter and pursuant to certain acts of the Legislature of the State of Missouri, said County of Butler subscribed for $100,000 of the stock of the Cairo & Fulton Railroad Company of Missouri, and paid such subscriptions by a conveyance (made on its behalf by the Governor of Missouri pursuant to the provisions of said acts) of all said lands to said company, which conveyance was dated April 20, 1857.

That thereafter said company issued and sold certain bonds, and, in order to secure the payment thereof, made and delivered a certain deed of trust, dated May 23, 1857, whereby said lands were granted to John Moore, John Wilson and Albert G. Waterman, as trustees for said purpose.

That Charles P. Chouteau became the owner of certain of said bonds, and said company having failed to pay the same when due, said Chouteau began a proceeding for the foreclosure

of said mortage on the 16th day of December, 1871, which proceeding resulted in a final decree of foreclosure by the Supreme Court of the State of Missouri on the 21st day of June, 1882.

That at the sale under said decree of foreclosure Charles P. Chouteau became the purchaser and owner of the lands aforesaid, which were duly conveyed to him by an instrument dated October 30, 1882.

That thereafter, on the 19th day of November, 1886, said Chouteau sold and conveyed the lands aforesaid to plaintiffs in error, who have ever since exercised such acts of ownership and possession as the nature of the lands admitted of.

That notwithstanding its subscription to the stock of the Cairo & Fulton Railroad Company, and the patent made on its behalf by the Governor of Missouri, conveying said lands to said company to satisfy such subscription, the County of Butler filed on the 7th day of November, 1866, a suit in the circuit court of said county to vacate and annul said patent of the Governor, and the mortgage made by said railroad company to Mr. Waterman and Mr. Wilson to secure its bonds.

That the nominal defendants in said suit were the Cairo & Fulton Railroad Company and Moore, Waterman and Wilson, the trustees aforesaid; that pretended service was had upon such trustees by publication and upon said company by summons served upon one Green L. Poplin; that in fact before the institution of said suit Moore and Waterman, two of said trustees, had died and said railroad company had been dissolved by a special act of the Legislature of the State of Missouri and by a sale of its property and franchises made pursuant to said act on the 1st day of October, 1866, and that neither said company nor said trustees could sue or defend in any court of justice.

That after the death of the trustees aforesaid, other trus-

tees had prior to the commencement of said suit been appointed in the manner provided by the deed of trust in their lieu and stead, and that said substituted trustees were not made parties defendant nor in any manner notified to appear in said suit.

That notwithstanding the death of said trustees and the dissolution of said railroad company, certain attorneys falsely pretended to appear on their behalf and plead in said suit; and that said suit resulted in a decree by said circuit court of Butler County, which was rendered July 2, 1869, vacating and annulling the patent and mortgage aforesaid, and revesting the title to said lands in the County of Butler.

That thereafter the County of Butler conveyed to the various defendants herein various tracts of said lands, and said defendants and grantees have continued from time to time to claim the title thereto, although never in possession thereof, which claims have prevented the plaintiff from selling and disposing of said lands.

Wherefore the plaintiff prays for a decree vacating and annulling said decree of the circuit court of Butler County, rendered July 2, 1869, and quieting the title to said lands as against the claims of the defendants thereunder.

ANSWER.

(Trans., pp. 22-26.)

The answer of the St. Louis, Iron Mountain & Southern Railway Company denies specifically the allegations of the petition, and by way of cross-bill alleges that it is the owner and in possession of part of the lands described in the petition, and that plaintiffs have trespassed thereon; wherefore it asks for an injunction to restrain future trespasses, and for a decree quieting its title as against the claims of plaintiffs.

The answers of Butler County and the remaining defendant are in effect general denials of the allegations of the petition.

EVIDENCE.

On behalf of the plaintiffs the following evidence was introduced:

I. September, 1850, the United States to the State of Missouri.

The Act of Congress approved September 28, 1850, and *patent made pursuant to said Act* (9 U. S., 519) granting the lands in controversy to the State of Missouri. (Trans., p. 26.)

II. February, 1853, State of Missouri to Butler County.

The act of the Legislature of the State of Missouri approved February 23, 1853 (Acts 52–53, p. 238), donating lands to Butler County. (Trans., p. 26.)

III. February, 1853, Butler County to Cairo and Fulton Railroad Company.

a. The act of February 24, 1853 (Acts 52–53, p. 121, Secs. 1, 11, 12, 28, 29, 30 and 32), providing for the formation of railway corporations and authorizing counties to subscribe for stock and pay subscriptions out of the proceeds of lands received from the State. (Trans., p. 26.)

b. The articles of association of the Cairo & Fulton Railroad Company showing that the road was projected to run through Butler County; certificate of incorporation dated January 12, 1854; also special act of the Legislature of Missouri confirming and ratifying the incorporation of said company, approved February 20, 1855. (Acts 54–55, p. 314.) (Trans., pp. 27–30.)

The law under which the railroad corporation was organized contains the following provisions:

Sec. 11. "Upon the dissolution of any corporation created under this act, unless other persons shall be appointed by the Legislature or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of the corporation dissolved and shall have full power to settle its affairs, collect and pay all outstanding debts and divide among the stockholders all the money and other property that shall remain after the payment of debts and necessary expenses."

Sec. 12. "The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, describing it by its corporate name, and shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands."

c. The act of December 7, 1855 (Acts 55, p. 353) requiring Butler County to subscribe to the stock of the Cairo and Fulton Railroad Company and pay such subscription in lands at an agreed valuation, on petition of a majority of the voters of the county. (Trans., p. 26.)

d. The act of December 10, 1855 (Acts 55, p. 472) authorizing the county court of Butler County to subscribe to the stock of any railroad corporation that might run through the county, and satisfy its subscription in swamp lands at an agreed valuation. (Trans., p. 27.)

e. The act of March 1, 1855 (Acts 54–55, p. 475) establishing a district county court for Butler and other counties. (Trans, p. 37.)

f. The following orders of the county court of Butler County, subscribing for one hundred thousand dollars of the stock of the Cairo and Fulton Railroad Company and directing a conveyance of the one hundred thousand acres of land involved in this controversy to satisfy said subscription, to wit:

Order of July 24, 1854 (Trans., p. 30);
Order of October 24, 1854 (Trans., p. 30);
Order of December 6, 1855 (Trans., p. 31);
Order of December 6, 1855 (Trans., p. 32);
Order of March 5, 1856 (Trans., p. 33);
Order of December 9, 1856 (Trans., p. 33).

g. A patent, dated April 20, 1857, made by the Governor of the State of Missouri on behalf of Butler County, pursuant to said orders, conveying the lands aforesaid to the Cairo and Fulton Railroad Company. (Trans., p. 34.)

IV. May, 1857, Mortgage of Railroad Company.

A deed of trust made by said company, dated May 23, 1857, conveying lands to Albert G. Waterman, John Moore and John Wilson, trustees, "and unto the survivor and survivors, successor and successors of them forever," to secure the payment of sixteen hundred bonds of one thousand dollars each. (Trans., p. 34.)

The eighth clause of this deed of trust is as follows:

"That for the purpose of continuing and securing the due execution of the trusts hereby created, it is declared that all vacancies that may occur in the office of trustee by death, resignation or otherwise, shall be filled thus: The first vacancy shall be filled by a majority of the members of the board of trustees as constituted, being in office at the time such vacancy shall take place; the next vacancy shall be filled by said party of the first part (the Railroad Company), and so on, alternately,

until the end; and trustees so appointed shall fill the term and succeed to all the duties, and have all the powers hereby conferred upon the members of the board of trustees herein named and provided for. They shall constitute and appoint, of their own number or otherwise, a president of their board of trustees, who shall be a member thereof, and who shall hold his office for such time and have and exercise such powers as they may confer and appoint, as fully and with like effect as if herein expressed."

V. May, 1858, Constitution of Board of Trustees.

The original order of John Moore, John Wilson and A. G. Waterman, trustees, constituting and appointing Mason Brayman "president of the board of trustees provided for." (Trans., pp. 43–61.)

VI. February, 1862, Death of Waterman, Trustee.

Deposition of J. S. Waterman, son of Albert G. Waterman, proving death of A. G. Waterman, trustee, in February, 1862. (Trans., p. 41.)

VII. March, 1866, Appointment of Brayman to Office of Trustee in lieu of Waterman, deceased.

Original order of board of trustees, dated March 22, 1866, as follows:

"Under authority of the power invested in us by a certain deed of trust executed by the Cairo & Fulton Railroad Company of Missouri, dated May 23, 1857, we as surviving and remaining trustees do hereby appoint and constitute Mason Brayman, of Illinois, trustee to fill the vacancy caused by the death of Albert G. Waterman, original trustee named in the deed.

Witness our hands and our official seal the day above written.

[SEAL.] JOHN WILSON,
Trustee.
MASON BRAYMAN,
Trustee and President."

(Trans., pp. 43–61.)

VIII. September, 1866, Death of Moore, Trustee.

Deposition of Van Nostrand, showing that John Moore, trustee, died September 23, 1866. (Trans., p. 42.)

IX. October, 1866, Dissolution of Cairo & Fulton Railroad Company.

a. An act of the Legislature of Missouri, approved December 11, 1855, (Acts 55, pp. 44–46), entitled

"An Act to expedite the construction of the Cairo & Fulton Railroad Company," which authorized the Governor of the State of Missouri to issue to said compay bonds of the State not exceeding two hundred and fifty thousand dollars, under certain conditions, which should be to all intents and purposes a first mortgage on the road and every part and section thereof, and its appurtenances, in favor of the people of the State.

Sec. 11 of this act provided that "if the company should default in the payment of the interest or principal of these bonds, it should be lawful for the Governor to sell the road and its appurtenances and buy the same for the use of the State." (Trans., p. 85.)

b. The act of February 19, 1866, entitled

"An act to provide for the sale of certain roads and property and to foreclose the State's lien" (Acts 64–65, pp. 107–114), which act is known as the "Sell-Out Act," and contains the following provisions (Trans., p. 44):

"Sec. 1. It shall be the duty of the Governor to advertise the St. Louis & Iron Mountain Railroad Company, the Cairo & Fulton Railroad Company, * * * and every part and section of said roads as far as the same are constructed or projected, together with their appurtenances, rolling stock, and property of every description, and all rights and franchises thereto belonging, for sale; and to sell the same at auction to the

highest bidder in pursuance of the several acts creating a lien on said roads, their appurtenances, rights and franchises in favor of the State."

"Sec. 3. It shall be the duty of the commissioners appointed for the Cairo & Fulton Railroad Company to attend the sale of said railroad as advertised by the Governor, and to bid in the same for the use and benefit of the State for an amount not exceeding the lien on said railroad in favor of the State; and if said railroad is struck off and sold to said commissioners, they shall take possession and hold the same, with their appurtenances and property, manage, operate, and dispose of the same in the manner provided in this act."

"Sec. 8. Whenever, and as soon as an award is made and approved under either of the foregoing sections, * * * the Governor shall, in the name and behalf of the State, execute and deliver to such purchasers a formal deed of conveyance under the great seal of the State, which shall be construed as other deeds conveying real estate, and shall have the effect to convey, transfer, and make over to the purchasers said road and all of the franchises, privileges, rights, title, and interest pertaining to the road so sold, all roads, roadbeds, rolling stock, machine shops, and all other property, both real and personal, of every description, belonging or in any wise appertaining thereto: *Provided*, that nothing in this act shall be so construed as to authorize the commissioners to convey any of the lands subscribed by counties to the stock of the Cairo & Fulton Railroad Company."

"Sec. 9. The companies or persons purchasing any of the above-named roads shall have all the rights, franchises and immu ies which were had and enjoyed by the companies for whose default said roads were sold, under the charter and the laws amendatory thereof, subject, however, to the conditions and limitations therein contained and not inconsistent with the provisions of this act."

(Acts 64–65, pp. 107–114; Trans., p. 44.)

c. A deed of the Governor of the State of Missouri made pursuant to the sale had under said act, dated October 1, 1866, *whereby all the property, rights, franchises* and appurtenances of the Cairo & Fulton Railroad Company were conveyed to the State of Missouri. (Trans., p. 44.)

d. The deposition of Henry H. Bedford, one of the promotors and directors of the Cairo & Fulton Railroad Company, who testified that during the war of the rebellion the roadbed and property of the company were entirely abandoned; that the iron rails and cars near Cairo went into the river; that the engines were destroyed in part and part taken to St. Louis by purchasers from the State after the sale under the Sell-Out Act; that the road had not been completed nor operated before its sale. (Trans., pp. 75–76.)

X. November, 1866, Suit of Butler County against Railroad Company and Trustees.

A certified copy of "so much of the record as remained on file," showing that on the 7th day of November, 1866, Butler County brought suit in the circuit court of Butler County against the Cairo & Fulton Railroad Company, John Moore, John Wilson and Albert G. Waterman, to vacate and annul the patent of the Governor dated April 20, 1857, conveying the lands herein involved to said company, and the deed of trust made by said company to secure its bonds. All the files, including the petition in the case, have been lost, but it appears from the partial record that the defendant trustees were notified by publication and the Railroad Company by service of summons made on one Green L. Poplin, and that various defaults were entered and certain demurrers were filed and overruled. (Trans., pp. 40–88–104.)

Testimony showing that when suit was brought the dissolution of the railroad company and the death of the trustees referred to were unknown to the attorneys for the county (Trans., p. 99); also that motions and pleadings purporting to have been filed by "attorneys for defendants" were filed by one Chapman without authority from any of the trustees named, said Chapman testifying as follows:

"I was employed by Mr. Bedford, and I had a talk with Mr. Poplin, who was understood to be president of the railroad company. I never received any compensation whatever. I had no correspondence with and was never employed by either of the trustees in any way. I was never a partner of any firm composed of Chapman, Bedford & Owens, whose name is subscribed to the pleadings. I was in court when the case was tried, and if any evidence was offered by defendants I have no recollection of it, and I think I would recollect if there had been any. The trial was *ex-parte*." (Trans., pp. 105–107–108.)

Henry H. Bedford, who was appointed trustee to succeed John Moore, deceased, on April 11, 1867, testified that—

"If Chapman had ever done anything in the suit he had never known it; he had never done anything himself; that he (Bedford) was present in court when the case was called, and got up and stated to the Court as *amicus curiæ* that the proceeding was all wrong; that the Cairo & Fulton Railroad Company was disorganizing, and there was nobody there to appear for said company; that the board of trustees had not, nor had any of them, been notified of the existence of the suit; and that hence any proceeding of that character was null and void." (Trans., p. 70.)

The testimony of Bedford is confirmed by the depo-

sition of a lawyer named Crum, who was also present and remembered what had occurred. (Trans., p. 83.)

XI. July, 1869, Decree of Circuit Court of Butler County.

A final decree rendered by the Circuit Court of Butler County on the 2d day of July, 1869, in the case of Butler County *vs.* The Cairo and Fulton Railroad Company, John Moore, John Wilson, and Albert G. Waterman, which purported to vacate and annul the patent to the railroad company, dated April 20, 1857, and also deed of trust dated May 27, 1857, whereby the lands were conveyed to Moore, Waterman and Wilson to secure the bonds of the company. (Trans., p. 40.)

XII. Fee of Attorney for County.

Deeds showing that immediately after the decree aforesaid was rendered, Butler County conveyed to the attorney who procured it twenty-seven thousand nine hundred and forty-nine (27,949) acres of the lands involved, as a fee for his services. (Trans., pp. 84–96.)

XIII. Subsequent Conduct of County.

Certain orders of the county court of Butler County, showing that it retained control of the stock of the Cairo & Fulton Railroad Company notwithstanding said decree, and that thereafter for a period of many years it assessed the lands for taxation in the name of the purchaser at the foreclosure sale to be presently referred to. (Trans., pp. 54, 62, 81, 82.)

XIV. Foreclosure Proceeding 1871-1882.

A certified copy of the record showing that Charles P. Chouteau, having become the owner of most of the bonds of the Cairo & Fulton Railroad Company, secured as aforesaid, brought suit in December, 1871, against

said company and its directors, against the surviving and substituted trustees under the mortgage and against Thomas Allen and others claiming an interest in the lands, to foreclose the mortgage whereby said bonds were secured. (Trans., pp. 16–24–77.)

In this suit Thomas Allen, one of the defendants, filed an answer alleging the dissolution of the railroad company October 1, 1866, by the sale under the Sell-Out Act, and asserting title to the lands in himself under conveyances made to him by Butler County before the commencement of the foreclosure suit. (Trans., pp. 35–37.)

A final decree of foreclosure, rendered by the Supreme Court of the State of Missouri in the suit aforesaid, June 21, 1882, which directed a sale of the lands to satisfy said bonds. (Trans., p. 35.)

XV. October, 1882, Purchase by Charles P. Chouteau.

The original deed of John H. Fisse, dated October 30, 1882, Commissioner of the Supreme Court of Missouri, acting under the decree aforesaid, conveying the lands here involved to Charles P. Chouteau. (Trans., p. 39.)

XVI. November, 1886, Purchase by Plaintiffs in Error.

The original deed from Charles P. Chouteau aforesaid, dated November 19, 1886, conveying said lands to plaintiffs in error. (Trans., p. 39.)

XVII. Possession of Plaintiffs in Error.

The testimony of certain witnesses showing that since 1886 the plaintiffs in error have taken such possession of the lands as they admitted of; that they leased certain tracts and cut timber from certain other tracts from time to time, and exercised such other acts of

ownership as the nature and extent of the lands admitted of. (Trans., pp. 44–56.)

Tax receipt and assessment-rolls, showing that ever since 1881 the lands had been assessed by Butler County in the name of, and taxes had been paid by, Charles P. Chouteau and his grantees. (Trans., p. 54.)

RECAPITULATION.

The following uncontroverted facts are disclosed by the record. Prior to 1856 the County of Butler was the owner of the lands involved. In 1857 said lands were lawfully conveyed by proper instrument to the Cairo & Fulton Railroad Company to satisfy the county's subscription to its stock. In the same year the Railroad Company conveyed the lands to Moore, Waterman and Wilson and their successors, in trust to secure its 1,600 bonds of $1,000 each. In 1861, before the completion of the road, the track and personal property of the company were appropriated by the Federal authorities, and destroyed. After the war the State of Missouri caused the property and franchises of the company to be sold at public auction to satisfy certain bonds of the State which had, under the provisions of an act of 1855, been loaned to the company upon such security. This sale, made October 1, 1866, resulted in the transfer of all the "property and franchises" of the company to the State, except the lands involved in this controversy, with respect to which the mortgage to Moore, Waterman and Wilson aforesaid was declared by said act to be paramount. This sale extinguished and dissolved the railroad corporation.

The law under which the corporation was organized provided that upon the dissolution of the company, its directors should be trustees to take charge of its property and to

wind up its affairs, with power to sue and be sued "as trustees of the corporation."

In the meantime two of the trustees named in the mortgage of the Railroad Company, to wit, John Moore and Albert G. Waterman, had died. The latter died in 1862 and the former September 23, 1866. The deed of trust provided that upon the death of a trustee the vacancy should be filled by a majority of the "board of trustees" constituted by the deed. This board consisted of the three trustees named and a president appointed by them, "of their own number or otherwise." Upon the occurrence of the first vacancy referred to, the board was composed of John Wilson and John Moore, the trustees named in the deed, and Mason Brayman, who had been elected president of the board and in virtue of the provisions of the deed had become a member thereof.

On the 22d day of March, 1866, a majority of the board, as then constituted, appointed Mason Brayman trustee in lieu of Waterman, deceased. Brayman accepted the trust, and thereupon, to quote the language of the deed, "succeeded to all the duties and powers conferred by the deed upon the trustee named." John Moore, trustee, died September 23, 1866.

On the first day of October, 1866, therefore, the lands involved in this controversy were vested in the directors of the Cairo & Fulton Railroad Company as "trustees for its stockholders and creditors, with power to sue and be sued as such trustees," subject to a mortgage vesting the title in John Wilson and Mason Brayman, trustees, to secure 1,600 bonds of $1,000 each.

On the *7th day of November, 1866*, suit was instituted by the County of Butler, in the circuit court of Butler County, against the *Cairo & Fulton Railroad Company, John Moore, John Wilson and Albert G. Waterman*, to vacate and annul

the deed conveying the County's title to the Railroad Company, and the company's mortgage to secure its bonds. The record of this proceeding was lost or destroyed, but it appears "by so much thereof as remained on file in the office of the clerk of the circuit court," that the defendant trustees were served by publication, and the railroad company by summons served upon one Green L. Poplin.

Neither the directors of the railroad company nor Mason Brayman, the substituted trustee, were made defendants in or notified of the suit.

Green L. Poplin, upon whom service appears to have been had, was once president of the railroad company.

It appears by the partial record of the case that demurrers and certain motions had been filed on behalf of the "defendants," by Chapman, Bedford and Owen, attorneys; but by the testimony of these gentlemen it was proved that no one of them had been retained or authorized to appear by any party to the suit. One of them (Bedford) testified that he had never signed or authorized to be signed on his behalf, any pleading whatever in said cause, had not represented any party thereto, and had never been a partner of any firm composed of Chapman, Bedford and Owen. Chapman testified that he filed the pleading not at the request of any defendant, but at the request of Bedford, who he understood represented Brayman, *who was not a party.*

An *ex-parte* hearing was had in 1869 of certain documentary evidence, at which no one appeared for the defendants. Bedford appeared, however, as *amicus curiæ*, pointed out the death and defect of parties defendant, and protested against a decree. Notwithstanding the protest, a decree was rendered by the court July 2, 1869, vacating and annulling both the deed to the railroad company and the deed of trust securing its bonds.

The object of the present proceeding was to vacate and

annul said decree of the circuit court of Butler County. It was begun in the court which rendered the decree by parties in privity with the legal owners of the lands, claiming under a subsequent decree of the Supreme Court of the State foreclosing said mortgage in a suit begun in 1871 against the directors of said railroad company and the original and substituted trustees. The petition herein sets out with great particularity the facts aforesaid and asks that the decree of 1869 be vacated and annulled, because—

1st. Prior to the commencement of the suit in which it was rendered, the defendant railroad corporation had been dissolved;

2d. Prior to the commencement of said suit two of the trustees, defendants therein, had died;

3d. The directors of the railroad company were not made parties defendant, nor notified;

4th. Mason Brayman, the substituted trustee, was not made a defendant nor notified;

5th. The pretended appearance of defendants by Chapman, Bedford & Owen was unauthorized with respect to all of the defendants and in the nature of things impossible, with respect at least to the two dead trustees and the dissolved corporation;

6th. The pretended service upon Green L. Poplin was not service upon the Cairo and Fulton Railroad Company, because said corporation had been dissolved and the directors alone were authorized to represent it, and because, even conceding the existence of said corporation, Poplin was not its president or authorized to accept service for it.

Upon a trial of the issues involved, the circuit court of the city of St. Louis, to which court the case had been sent from the circuit court of Butler County upon an application

for a change of venue, rendered on the 6th day of July, 1891, a decree vacating and annulling the decree of the circuit court of Butler County dated July 2, 1869.

The opinion of the circuit court of St. Louis is as follows:

"This case has been elaborately argued and thoroughly briefed, but it is finally virtually conceded that its decision depends on the solution of two questions, the first of which is: Did the Cairo and Fulton Railroad Company have the title to these lands when it executed the deeds of trust under which the plaintiffs claim title? And if this shall be answered in the affirmative, then the second question is, Did the decree of the circuit court of Butler County in the suit brought by that county against the Cairo and Fulton Railroad Company *et al.* affect the title conveyed by said deeds of trust? I am of the opinion, so far as this court is concerned at least, that the decision of the Supreme Court in Chouteau *vs.* Allen (70 Mo., 290) must be held to decide the first question in favor of plaintiff.

"The answer of Allen in that suit specifically denied that the Cairo & Fulton Railroad Company was the owner of these lands when these deeds of trust were given. This of course required Chouteau at the trial of that case to prove that the Railroad Company did have the title to these lands when it executed those deeds of trust. The evidence on this point must have been the same given on the same point at the trial of this case, and the opinion of the Supreme Court in that case shows that this question was regarded as one of the controlling points in the case. On page 326 of that opinion is this language: 'So that the inquiry is narrowed down to the point whether the title to the swamp lands (the same lands in dispute here) was in that company (Cairo & Fulton Railroad Co.) at the time those deeds of trust were executed.' It further appears from that opinion that there was a division of opinion among the members of that court on this question (see page 327).

"In view of the fact that this very question was in issue in that case, and was regarded by the court as one of the

controlling questions in the case, and also in view of the further fact that the court was not unanimous as to the correct decision of this question, which no doubt caused every member of the court to examine the point carefully for himself, I think it would be quite unwarranted for this court to assume that that court overlooked any essential fact bearing on this question and disclosed by the record. It is true that in the opinion rendered in that case it is not stated by what means or in what manner the act of December 10th, 1855, operated on the conveyance from Butler County to the Cairo & Fulton Railroad Company; but this does not warrant us in assuming that the court overlooked any of the essential facts disclosed in the record of the case. I am of opinion, however, that the Supreme Court held that the orders made by the county court of Butler County after the act of December 10, 1855, went into effect, with the deed from the Governor, had the effect, under the terms of that act, to pass the title to the railroad company without reference to the validity of the previous subscription of the county court or the district court. If that decision is reviewed, I think it must be done by the Supreme Court itself.

"Whether or not the decree in the suit of Butler County against the Cairo & Fulton Railroad Company *et al.* affects the title to the lands conveyed by these deeds of trust depends, in my opinion, upon whether or not the persons holding that title were made parties to that suit. The evidence establishes these facts: That the three trustees named in the deeds of trust, under the power given them therein, elected one Brayman as president of the board of trustees. By the terms of the deeds of trust he then became a member of the board of trustees. The deeds authorized a majority of the board of trustees to fill the first vacancy occurring among the trustees. Before the commencement of the suit by Butler County, one of the trustees had died, and his successor had been appointed by Brayman, who was then a member of the board of trustees and one of the surviving trustees. This successor so appointed was Brayman himself. The only objection I see to the regularity of his selection is that he was chosen by his own vote. But his election was reported to the railroad company, the other party to the

deed, and assented to by it; and he accepted and entered into the office, and acted and was recognized as such. His election would seem to have been assented to by the other trustee also, as it is not shown he ever objected. I am not prepared to hold, under the circumstances, that his election was a nullity. Under the terms of the deeds of trust I think the title vested in the new trustee as soon as he was elected and accepted the office.

"In the suit brought by Butler County the only defendants were the Cairo and Fulton Railroad Company and the three original trustees. Brayman, who had been appointed a trustee in lieu of the original trustee who had died, was not made a party. I think this was a fatal defect of parties. Of course, that decree could not affect the title of any one not a party to the suit. If we are right in holding that Brayman was duly elected a trustee as successor to one of the original trustees and that the legal title vested in him, then this legal title was not disturbed by the decree in that suit. A deed made by two of these trustees while the third is alive and acting as trustee, cannot affect the title.

"Again, the evidence further shows that during the pendency of that suit another of the original trustees died and his successor was appointed in the manner as provided in the deed. The death of this second trustee was not suggested nor was his successor made a party, so that the decree was rendered against only one of the three trustees, the other two being alive and acting.

"For this want of necessary parties, I am of opinion that that decree did not affect the title conveyed by these deeds of trust. For it must be borne in mind that none of the owners or holders of the bonds secured by these deeds of trust, the real beneficiaries, were parties to that suit. Many other points were discussed by counsel, but in this view of the case they become immaterial. There will be a decree for the plaintiffs."

The defendants thereupon appealed to the Supreme Court of Missouri, which court, on the 8th day of May, 1894, reversed the judgment of the circuit court of St. Louis and directed the suit to be dismissed.

The opinion of the Supreme Court is as follows:

F. G. OXLEY STAVE CO. and FRED. G. OXLEY, Trustee for F. G. OXLEY CO., *Respondents*, *vs.* THE COUNTY OF BUTLER *et al.*, *Appellants.* } In the Supreme Court of the State of Missouri. Oct. Term, 1893.

This is a suit in equity to set aside a decree in favor of Butler County rendered at the July term of the Circuit Court of Butler County, in 1869, and to cancel certain deeds and patents, among them a patent from said County to the St. Louis, Iron Mountain & South. Rway. Co., dated December 10, 1874, and to quiet the title to the lands mentioned in the decree and said several deeds and patents. The lands in controversy are swamp lands and were conveyed by the Secretary of the Interior to the State under the act of Congress of Dec. 28, 1850, (9 U. S. Stat. at Large, p. 519). The following acts of the legislature of Missouri relating to said lands were passed: Mch. 3, 1851, "An act donating certain swamp and overflowed lands to the counties in which they lie" (Session Acts 1850 and 1851), which act did not apply to Butler County and some other counties in the southeast, but on the 23d day of Feb., 1853, the provisions of the act of 1851 were extended to them (Session Acts 1852 and 1853, p. 108).

Feb. 24, 1853: "An act to authorize the formation of railroad associations and to regulate the same (Session Acts 1853–3, p. 121), secs. 29 and 32 of which are as follows:—

Sec. 29. "It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act of this State; and the county court or the city council subscribing or proposing to subscribe to such capital stock may for information cause an election to be held to ascertain the sense of the tax-payers of such county or such city, as to such subscriptions, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

Sec. 32. "Any county subscribing for railroad stock, which shall have internal improvement funds or overflowed or swamp lands granted to it by the State, may apply such funds or mortgage or sell such overflowed or swamp lands to pay such subscription or any part thereof, and provide for the remainder, if any, by the tax as aforesaid. * * *"

Dec. 7, 1855: "An act to enable certain counties (Butler among the number) to transfer swamp, wet and overflowed lands to the Iron Mountain or Cairo and Fulton R. R. Co. whenever a majority of the voters of either of said counties shall petition the county court to do so. (Session Acts 1855, p. 353).

Dec. 10, 1855, 16th sec. of which is as follows:

Sec. 16. "It may be lawful for any county court of any county in this State having overflowed or swamp lands, to subscribe the same as stock to any railroad which may pass through such county, upon such terms and to be valued at such price, as may be agreed upon by the county court and the directors of the railroad company in which such stock may be taken." (Session Acts 1855, p. 477.) A district county court was established by the act of Mch. 1, 1855, which act provided that the court should "Possess all the powers and perform all the duties that the respective county courts now possess or may perform in the counties of Stoddard, Dunklin and Butler." (Session Acts 1855, p. 474.) The following orders looking to the disposition of said lands were made by the county and district county courts respectively:

First. In the county court of Butler County, July 24, 1854: "Ordered by the court that the clerk open columns on the poll-books for the purpose of taking the vote of the people for and against the county taking stock in the railroad."

Second. "In the county court of Butler County, Oct. 24, 1854: It appearing to the satisfaction of the court that qualified voters of said county are in favor of subscribing $50,000 to the Cairo & Fulton R. R., it is hereby ordered by the court that the aforesaid amount of stock be subscribed, payable out of the proceeds of the sale of swamp lands, and it is ordered that Daniel L. Jennings be appointed as agent to subscribe said stock and attend to the interests of said

county in said railroad company, and that a warrant be drawn upon the treasurer of this county in favor of the prest. of said railroad company for $2,500 payable out of swamp lands fund to pay the five per cent. upon the amount of stock subscribed."

Afterwards, on Dec. 6, 1855, the District County Court made an order reciting the county clerk's order, and that the railroad was willing to take the swamp lands at $1.00 per acre, and ordered that when the lands were selected that Daniel Jennings make deeds to the Railroad and represent the county in voting the stock; and on the same day, this District Court subscribed $50,000 more to the capital stock, to be paid for by the alternate sections of swamp land at $1.00 per acre.

Afterwards, on Mch. 5, 1856, Solomon Kitchen and H. H. Bedford, agents for the railroad, presented their report of their selection of swamp and overflowed lands, amounting to 100,119$\frac{94}{100}$ acres. At the same term the Court ordered the clerk to certify to the register of lands at Jefferson City, that full payments had been made by the railroad company, with a list of the lands. After the receipt of the clerk's certificate, and on the 20th day of April, 1857, the governor issued a patent to the railroad company for said lands, which patent recites that it is made pursuant to the act of Dec. 7, 1855.

On the 23d of May, 1857, the C. & F. R. R. Co. executed a deed of trust upon the lands in controversy and other lands, to secure the payment of 1,600 bonds of $1,000 each to Waterman, Moore and Wilson, which deed was recorded in Butler County Dec. 15, 1859. On Oct. 1, 1866, the C. & F. R. R. was sold under what is commonly called the "sell-out" act, passed Feb. 19, 1866, amended by the supplementary act of Mch. 19, of the same year, the 8th sec. of which provides that "*Nothing in this act shall be construed to authorize the commissioners to convey to the purchasers of the C. & F. R. R. any of the lands subscribed by the counties to the stock of said road.*"

Dec. 16, 1871, Chas. P. Chouteau, having been the owner of some of the bonds of said railroad, filed his petition in the Miss. County Circuit Court against Thos. Allen *et al.* to foreclose said deed of trust, and in the Supreme Court of

Missouri a decree in said cause was rendered in favor of said Chouteau, and as directed in said decree the lands in controversy, with other lands, were sold by a special commissioner of this court. Mr. Chouteau becoming the purchaser thereof, on Dec. 19, 1886, he sold said lands together with a large quantity of other real estate to the F. G. Oxley Stave Co. and conveyed the same to F. G. Oxley, trustee of said company. On the trial, plaintiff offered in evidence a certified copy of the record and proceedings in said cause, presumably as a former adjudication of the matters now in controversy. On Nov. 7, 1866, Butler County filed in the Circuit Court of that County its petition against the C. & F. R. R., and the said Moore, Wilson and Waterman, trustees, to cancel and set aside the patent from the State to said R. R. Co. and the deed of trust from said railroad to the trustees.

Service was had upon Green L. Poplin, the prest. of the C. & F. R. R. and upon the defendants Moore, Wilson and Waterman, by publication.

The files of this cause are lost. The record offered consisted of the affidavit for publication, order of publication, and the publication itself as to the non-resident defendants; orders continuing the cause, which was pending about three years; judgment by default against the defendants at various times; recitals of the filing of demurrers, and the decree itself, annulling the patent made by the governor to the R. R. Co., and the deed from the R. R. Co. to Moore, Wilson and Waterman, trustees, and all right, title or interest acquired by them in and to said lands, and revesting the same in Butler County.

It now appears that Waterman, one of the trustees, had previously died at Phila., Pa., in Feb., 1862, and that John Moore, another trustee, had died in Boston, Mass., Sept. 23, 1866.

In this connection, plaintiffs read in evidence an extract of order No. 5 of the Board of Trustees of the R. R. Co., reciting the death of Mr. Waterman and an appointment by John Wilson of Mason Brayman to succeed said Waterman as trustee, dated Mch. 22, 1866. Defendant objected to this paper on the ground that it was hearsay, and that John

Wilson was not a majority of said Board and could not make said appointment.

Plaintiffs offered another paper signed by Waterman, Moore and Wilson, appointing Brayman of Springfield, Ill., president of the Board of Trustees, of date May 7, 1858.

Plaintiffs also read in evidence an appointment by the Board of Directors of the C. & F. R. R. Co., of Henry H. Bedford as trustee to succeed John Moore, deceased, which appointment was made April 11, 1867, at Bloomfield, Mo., and was attested by Green L. Poplin, Prest., &c., and T. W. Johnson, Secty.

The record recites the appearance of the defendants. The files being lost, Jno. W. Emerson, the attorney who represented Butler Co. in obtaining the decree, testified that the firm of Bedford and Owen and Mr. Chapman appeared generally for the defendants, and produced a copy of a motion to strike out the second amended petition, as follows:

Butler Co.
vs.
C. & F. R. R. Co., A. G. Waterman,
John Moore *et al.*

In Butler County Circuit Court.

Now come the defendants and move the court to strike out the plaintiff's second petition herein for the following reasons:

1. Because said petition contains scandalous matter.
2. The allegations are impertinent, redundant and immaterial.

(Signed) BEDFORD, OWEN & CHAPMAN,
Attys. for Defendants.

Filed Oct. 2, 1868.
(Signed) ISAAC V. TUBB, *Clerk.*"

Also a copy of a demurrer as follows, which copy Mr. Emerson testified he made at the time from the files and found among his papers:

County of Butler, State of Mo., pl.,
vs.
C. & F. R. R., Jno. Moore, Jno. Wilson and A. G. Waterman, defts.

In the County of Butler, at the March term of the Circuit Court of said county, A. D. 1867, the defendants come and demur to the plaintiff's petition for the following reasons, to wit:

1. There is a misjoinder of parties herein.
2. There are parties included in this suit who occupy entirely different positions.
3. Plaintiff states that the governor, pretending to act as the agent of plaintiff, wrongfully and illegally conveyed by deed to said C. & F. R. R. 100,868.56 acres of land, and does not make proffer of said deed or make any excuse therefor.
4. Plaintiff states that on the 23d day of May, 1857, said C. & F. R. R. Co. conveyed said lands to John Moore, John Wilson and A. G. Waterman without making proffer of said conveyance, or any excuse therefor.

(Signed) BEDFORD & OWEN,
Attys. for Defendant.

Mr. Chapman, an attorney, testified that he was employed to aid in the defense of the action brought by the county to cancel the deeds and patents. James H. Vail was the judge before whom the case was tried. Judge Jno. W. Emerson and Ira E. Leonard represented the county. Bedford had been acting as a director of the company, and employed witness. Bedford was present in Court when the cause was tried. Witness took no part in the final hearing because Bedford and Poplin had agreed to get his fee, and failing to do so he notified them he would not appear and when the case was called he took no part in it. He remembered arguing motions and a demurrer for the defendants.

The contention of respondent is that the orders of the county and district courts aforesaid and the patents of the governor of the State made in pursuance of them, operated to transfer the title of said lands to the C. & F. R. R., and the decree of the Butler Circuit Court was void because fraud-

ulent and for want of necessary parties, while appellants insist, first that in attempting to dispose of the lands said courts did not comply with the law, but disregarded its requirements; second, that whatever color of title the R. R. Co. had was removed by the decree of the Butler County Circuit Court.

Other facts will appear in the discussion in the opinion.

But two questions are presented by the record for determination in this court.

First. Were the subscriptions by the county courts (county and district) of Butler County to the stock of the C. & F. R. R. and the conveyance of the swamp lands of that county to said railroad in satisfaction of said subscriptions, authorized by law?

Second. Ought the decree of the Circuit Court of Butler Co., annulling the conveyance of said lands, be set aside for the reasons urged by the plaintiffs, to wit: first because procured by fraud; and second, because two of the defendants named in it were dead at the time of its rendition, and the R. R. Co. a dissolved corporation?

Unless the decree is vacated, it will be unnecessary to enter upon the discussion of the power of the County Court to subscribe to the stock, and convey the lands in payment for it, for if it be conceded that the subscriptions were lawful on their face and the patents and deeds sufficient in form, still if they were obtained by fraud as found and adjudged in the decree at the Circuit Court, they became inoperative as if they had never been.

This, too, is the theory which the petition proceeds upon.

The primary purpose of the suit is to remove the cloud which this decree cast on plaintiff's title.

The attack upon the decree is twofold.

The contention is that it was obtained by fraud and collusion, and lest the evidence might be insufficient to satisfy the chancellor on this point, it is urged that the decree is void in law because rendered against two dead men and a dissolved corporation. As to the proposition that the judgment was procured by fraud, the burden is assumed by the plaintiffs to establish that the judgment was fraudulently obtained.

Perhaps there is no subject upon which the decisions of this court have been more uniform and consistent than those in regard to the character of evidence required in courts of equity to vacate a final judgment. Beginning with Jones *v.* Brinker, 20 Mo. 87, and coming down to Murphy *v.* DeFrance, 105 Mo. 53, it has been uniformly held that "the *fraud* for which a judgment may be vacated in equity, *must be in the procurement of the judgment.*" "If the cause of action be vitiated by fraud, that is a defense which must be interposed, and *unless its interposition be prevented by fraud,* it can not be asserted against the judgment." Freeman on Judgments (3d Ed., Sec. 489); Lewis *v.* Williams, 54 Mo. 200; Van Bibber *v.* Julian, 81 Mo. 618; Murphy *v.* DeFrance, 101 Mo. 151.

Applying this test to the pleadings and evidence in this case, we have a final judgment rendered in a court of general common law and equity jurisdiction as long ago as 1869. That court unquestionably had jurisdiction of the subject-matter and the parties litigant, so far as appears by the recitals of the judgment itself. To avoid this judgment it is charged that it was obtained by collusion and the pretended appearances of counsel. To sustain this charge, the evidence shows that this cause was pending for nearly three years; that service was obtained upon Green L. Poplin, prest. of the C. & F. R. R., by his acknowledgment of service upon the writ; that orders of publication were duly made and published against the defendants Moore, Wilson and Waterman, the trustees. It appears that the files of the case are now, and were, lost long prior to the commencement of this suit; but Judge Emerson, who brought the action for Butler Co., produced on the trial a certified copy of a motion signed by Chapman, Bedford & Owen, in which they appeared for defendants generally, and moved to strike out the plaintiff's petition, also a general demurrer.

Mr. Bedford, a witness for plaintiff, whose name as attorney was signed to these pleadings, was shown to have been present in open court when that cause was heard; and according to his statement, as a friend of the court remonstrated against the court proceeding to judgment because the trustees were not in court. His testimony negatives *all*

idea of collusion between Judge Emerson and his firm of Bedford & Owen, who represented the defendants. There were also charges by innuendo that Emerson's brother had made a deed to Mr. Chapman, to show that Chapman was consenting to the decree; but the evidence of Chapman was that Bedford and Poplin had promised him a fee, and relying upon their assurances that they would get it, he did not appear for the defendants along with Bedford and Owen, but as they neglected to pay him, he notified them some six months before the trial that he would appear no further, and though present in court, took no part in the trial.

The attempt to show that Mr. Chapman received any of this land as a consideration for assisting in or permitting this judgment, we think entirely failed.

As to the other evidence, it appeared that Emerson did not know either of the trustees, and knew nothing of the death of Moore or Waterman and proceeded upon the idea that they were both alive and that they had entered their general appearance by counsel.

The evidence tending to prove that this judgment was procured by any fraudulent practices is entirely too meager to sustain the judgment of the Circuit Court in setting it aside.

As was said in Picot, Admr. of Dillion *v.* Bates *et al.*, 47 Mo. 390, "More than twenty years have elapsed, and we are called upon to say that the judgment regularly entered and long acquiesced in shall be impeached for fraud, because merely the consistency of the account adjudged *cannot now be* shown."

But the court will not assume after so long a time from mere obscurity. When it is considered that this judgment had been rendered two years before the action had been commenced in Chouteau *v.* Allen, and that the attorneys of Chouteau in that case were cognizant of its existence at that time; this long delay in attacking it should be explained by plaintiffs. It must be assumed that an abstract of the title would have disclosed it to plaintiffs when they bought these lands.

Moreover Bedford claimed to have been duly appointed as trustee of those lands in 1867. He says he was in court when this decree was rendered. He was a member of the

bar, and a trustee of this fund, and the statute gave Wilson his co-trustee, three years as a matter of right to move to set aside this judgment and make his defense, and yet, knowing and feeling an injustice was being perpetrated, he remained silent.

It is significant that Bedford at no time suggested the death of the trustees Moore and Waterman to the court.

They were non-residents of this State. The evidence now discloses that one died in Boston, the other in Phila. There is not a word of evidence tending to show that Judge Emerson had the slightest notice of the death of either, and the inference of fraud on this account is without support. The conduct of Bedford is much harder to explain. He was a member of the bar. He claimed to have been a substituted trustee. He knew the object of this suit, and instead of contenting himself with acting as an *amicus curiæ* he should have suggested the death of his predecessor, Moore, and asked to be made a party defendant, and defended the trust which he now claims had been confided to his keeping, and not permitted Judge Emerson and Mr. Leonard, the counsel for the county, to proceed on the idea that Moore and Waterman were both alive.

He owed this to the court of whose bar he was a member, and he owed it to the beneficiaries of the trust he had assumed, but his laches in nowise attached to the court and opposing counsel, both of whom were ignorant of the facts. The other evidence shows that a trial was had in open court, which consumed some two hours or more in putting in the evidence.

Nothing was hid from public view. The cause was on the docket for three years, with the knowledge of Bedford, who claimed to be one of the trustees.

To permit a decree to be vacated on the loose recollection and uncertain memory of witnesses after twenty years, would establish a most hurtful precedent. Heffeman *v.* Howell, 90 Mo. 344.

Accordingly we held that plaintiff failed to show that the decree of the Circuit Court of Butler Co. was fraudulently procured.

II.

Ought the judgment be set aside because Moore and Waterman were dead when it was rendered? In order to secure certain bonds issued by it, the C. & F. R. R. on May 23, 1857, by its deed of trust, conveyed the lands which it obtained from Butler Co., together with other lands, to John Moore, John Wilson and A. G. Waterman, in trust to secure the payment of the bonds of said C. & F. R. R. Co. therein described, which said deed of trust was recorded in Butler County, Mo., Dec. 13, 1859.

This trust deed, after reciting the purpose for which it was made, "grants, bargains and sells unto said John Moore, John Wilson and A. G. Waterman, trustees, and *unto the survivor or survivors, successor and successors* of them forever, all and singular said lands therein described.

The eighth clause of the said trust deed is as follows: "That for the purpose of continuing and securing the due execution of the trusts thereby created, it is declared that all vacancies that may occur in the office of trustee by death, resignation or otherwise, shall be filled, thus: The first vacancy shall be filled by a majority of the members of the Board of trustees as constituted, being in office at the time such vacancy shall take place; the next vacancy shall be filled by the said parties of the first part, and so on, alternately, until the end; and trustees so appointed shall fill the term and succeed to and perform all the duties and have all the powers hereby conferred upon the members of the Board of Trustees herein named and provided for. They shall constitute and appoint of their own number, or otherwise, a president of their Board of Trustees who shall be a member thereof; and who shall hold his office for such time and have and exercise such powers and duties as they may confer and appoint, as fully and with like effect as if herein expressed. Such other officers and agents as shall be necessary to the execution of this trust may be appointed in such manner as they may determine—rate of compensation fixed and such rules and regulations made and carried into effect, as they may deem necessary."

Plaintiff read in evidence, over the objection of the defendants, the following paper:

Office of the Bd. of Trustees of the C. & F. R. R. Co. of Mo., Mch. 22, 1866.

Under authority of the power vested in us by the certain deed of trust executed by the C. & F. R. R. Co. of Mo., dated May 23, 1857, we, as surviving and remaining trustees, hereby appoint and constitute Mason Brayman of Ill. a trustee to fill the vacancy caused by the death of Albert G. Waterman, original trustee named in said deed. Witness our hand and official seals the day above written.

(Signed) JOHN WILSON, *Trustee.*
MASON BRAYMAN, *Trustee and Prest.*

(Bd. of Trustees C. & F. R. R. Co.) [SEAL.]

Also a similar paper signed by the three trustees, appointing said Brayman Prest. of the Bd of Trustees. Neither of these papers was acknowledged or recorded in the recorder's office of Butler County, nor was there any evidence that Butler Co., or its attorneys, had any notice whatever of said appointments.

A similar appointment of Henry H. Bedford, of date Apr. 20, 1867, by the Bd. of Directors of the C. & F. R. R., signed by its president, Green L. Poplin, was read in evidence over the objection of the defendants.

No notice of this appointment was given defendants, and said substitution was not recorded in said county of Butler. It is claimed by plaintiffs that the C. & F. R. R. Co. was dissolved by the sale thereof under the "sell-out" act of the General Assembly of Feb. 19, 1866.

Whereas defendants insist that by the very terms of that act these lands were not affected, the proviso of said act being "*Provided that nothing in this act shall be so construed as to convey or authorize the commissioners (appointed thereunder) to convey to the purchasers of the C. & F. R. R. any of the lands subscribed by counties to the stock of said road,*" and that for the purposes of its unsettled liabilility to the counties subscribing said stock, it was still a corporation. In this connection, also, the act of Mch. 21, 1868, is invoked by plaintiffs as a confirmatory act, and by defendant as recognizing the right of the several counties in these lands.

That act is entitled "An act for the final settlement of the C. & F. R. R. and to provide for the pay-

ment of all just claims made prior to May, 1891, and to distribute the unappropriated stock." By this act the Legislature authorized the county courts that took stock in the C. & F. R. R. to appoint agents to look after their interests, and require the old company to turn over to them all lands undisposed of by the company, and after selling such lands as were necessary to pay certain claims, to "turn over the remaining *unappropriated land* to the several counties to which it originally belonged." (Acts 1868, p. 92.)

It appears by the evidence of H. H. Bedford, that this company held annual elections in 1865, 1866 and 1867, and elected officers, and it was by this Board so elected he was appointed trustee in this deed of trust Apr., 1867.

Under this state of facts plaintiffs insist that the C. & F. R. R. was dissolved, and as its Board of Directors were not made defendants its property is not bound by decree, and Moore and Waterman being dead and their successors Brayman and Bedford, not having been made defendants, the trust fund in these lands could not be affected. On the part of defendants, it is maintained that as the corporation was served through its president, it was in court, and that by the terms of the deed of trust, upon the death of Moore and Waterman, Wilson, the surviving trustee, took the trust estate by survivorship, and as he had been duly served, the decree bound the whole trust estate, and cannot be held void after this great lapse of time.

Counsel for plaintiffs have referred to the decision of this court in Chouteau *v.* Allen, 70 Mo., 327, but as the decree of the Circuit Court of Butler Co. was rendered some two years before the action was commenced in Chouteau *v.* Allen, and as none of the defendants in this case were parties to that action, or are claiming under any party to that action, it is very plain that they are not estopped by the judgment in Chouteau *v*, Allen. Indeed, the learned counsel for plaintiffs concede this in their brief.

The record is entirely silent as to when Chouteau acquired the bonds which were the basis of his action against Allen, and there is no evidence that he owned any of those bonds when the suit of Butler Co. *v.* The R. R. Co. and the trustees was commenced in 1866, or for that matter that said bonds had been issued to any one at that time. It is con-

ceded by plaintiffs that it was not necessary to make the bondholders, if any, parties to the said suit to set aside the deed of trust; that if the trustees were made parties, and notified, that was sufficient. This is the undoubted rule in trusts of this character. Whatever binds the trustee in proceedings to enforce the trust, binds the bondholders, and whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. Kerrison *v.* Stewart, 93 U. S., 155–60; Richter *v.* Jerome, 123 U. S., 233; Shaw *v.* Railroad, 100 U. S., 605; Jones on Railroad Secureties, Secs. 363 & 438.

Leaving out of view for the present the power to substitute successors to those of the trustees that might die, it is unquestioned that in the absence of the provision in clause 8 of the deed of trust, upon the death of Waterman and Moore, the trust devolved upon Wilson as the sole surviving trustee. This was the rule at common law and was unaffected by our statute abolishing joint-tenancy in certain cases. General Stats. 1865, Ch. 108, S. 12; R. S. 1855, S. 13, p. 357; Stewart *v.* Pettus, 10 Mo., 468; Lewin on Trustees, p. 50; 1 Perry on Trusts, sec. 343; 1 Lewin on Trusts, secs. 261 and 262.

But it is urged that upon the death of Waterman, Brayman was appointed his successor. This presents a proposition not without difficulty.

If Brayman was not a trustee in whom this title was vested prior to Waterman's death, then it is clear that Wilson alone was not empowered to appoint him because it required a *majority of the Board to make the appointment*, and if he was not a member he could not participate in the appointment of himself.

If, on the other hand, he was already a member, what was the purpose of appointing him anew. Again this appointment, if made, was made in Springfield, Ill. If plaintiff is right it was an instrument in writing substituting a trustee who thereby became seized of the title to real estate in Missouri. This writing was not acknowledged and recorded in this State, and no one dealing with said lands was chargeable with notice of such substitution, and it is not claimed the county had such notice.

But as already stated, the plaintiffs now say that the Circuit Court's decree should be set aside because Brayman and Bedford were not made parties defendant.

It is well to bear in mind that this objection to that decree is not made by any one who was a party to it when it was rendered or had any interest at that time that could be affected by it. This attack is made by one who was and is a stranger to that suit, twenty years after its rendition. In State *ex rel.* Carter *v.* Clymer, 81 Mo., 122, this court approved the statement in Freeman on Executions, sec. 75, to the effect that "none but the parties to a suit will be allowed to interfere with its management, and that none but the parties to the writ who are liable to be injured by it, can complain of the irregularity by which it may be infected." Ellis *v.* Jones, 51 Mo., 160.

But if it be said that as a purchaser from one who purchased the lands under the judgment of Chouteau *v.* Allen, plaintiffs have a right to attack this judgment, the answer is that the sale under the decree in Chouteau *v.* Allen was made by a special commissioner, John H. Fisse, appointed by this court, and not through Brayman and Bedford, or either of them; and any title Mr. Chouteau obtained did not rest upon a recognition of Brayman or Bedford as trustees, by this court. Neither the C. & F. R. R., nor Wilson, Bedford, or Brayman, have, in all these years, sought to avoid that judgment, and a stranger to that judgment ought not and will not be allowed to complain that all the necessary parties were not before the court.

The suit was commenced and prosecuted against the parties in whom the record title appeared at that time.

Moreover, in voluntary or express trusts no title vests in the proposed trustees by whatever instrument it is attempted to be transferred, unless they expressly or by implication accept the office or in some way assume its duties and liabilities. 1 Perry on Trusts, sec. 259; Armstrong *v.* Morrill, 14 Wall., 138; Roberts *v.* Moseley, 51 Mo., 282.

It is not a violent presumption in favor of the judgment of a court of general jurisdiction to presume that it sufficiently appeared to the Circuit Court of Butler Co. that neither Brayman nor Bedford had ever accepted the trust or performed any action in regard to its execution from

which their acceptance could be presumed, and certainly we find nothing in this record which would rebut a finding by the Circuit Court that they had disclaimed said trust; Brandon *v.* Carter, 24 S. W., 1035, and in such a case the court might have dispensed with the necessity of bringing them in. Story Eq. Pl. (1892, 10th Ed.) S. 214a.

As to Bedford, it would be utterly unconscionable to permit him at this late day to open up said proceedings in view of his knowledge and testimony. But if plaintiffs are right that the corporation was dissolved by the "sell-out" act of 1866, nothing can be more conclusive than that Bedford was not a necessary party because according to their own showing he was not appointed a trustee until 1867. On the other hand, if the Railroad Co. was not dissolved, it is clear that having appeared as counsel of record in that case for Wilson, trustee, and for the company, he is estopped by his conduct in not suggesting his appointment as trustee, and so are those who would claim under or through him. It results that in our opinion the showing is insufficient to justify the Circuit Court in setting aside the judgment of the Circuit Court of Butler Co. because they were not parties defendant, as asked by plaintiffs.

The remaining ground for vacating that judgment is that "the president and directors" of the C. & F. R. R. Co. as such, were not made defendants, after its dissolution. Again bearing in mind that the act in favor of the decision in Moore *v.* Whitcomb, 48 Mo., 543, had not been rendered, and that the general appearance of the company had been entered by the president of the company and no decree of dissolution had been rendered against it, it is not at all strange that the Circuit Court should have proceeded against the corporation through its chief officer.

The State has expressly reserved these swamp lands from the operation of the "sell-out" act, and the title to them remained in the corporation in trust for its creditors and stockholders. The mere insolvency of the corporation, the sale of the larger portion of its assets and its inability to proceed with the purposes of its incorporation would not necessarily work a dissolution. Hill *v.* Fogg, 41 Mo. 563; State Nat. Bank *v.* Robidoux, 57 Mo., 446; Kansas City Hotel *v.* Sauer, 65 Mo., 279.

The decision in Moore *v.* Whitcomb, 48 Mo., was upon demurrer only. Whether the court with all the facts and the provisions of the "sell-out" act before it would have held the corporation dissolved for all purposes, we greatly doubt, but it is clear that the president, Poplin, was in court, and no suggestion of dissolution was pleaded, and if the corporation was dissolved, the failure to proceed against the president and directors, as trustees, was simply an irregularity that could have been amended if seasonably prayed, but it is no ground for vacating said judgment after this great lapse of time at the instance of one who was neither a creditor, or stockholder at that time.

In Dunklin Co. *v.* Chouteau, Division No. 1 of this court at the last term held that the great delay of Dunklin Co. in seeking to avoid the patent under which Mr. Chouteau held the lands of that county barred the county.

In this case, it appears that Butler County, as soon as the condition of society after the war would permit, began its action and repudiated the means by which it had been deprived of this great body of valuable jurisdiction. The action was pending for three years. It was determined in open court. No secrecy marked the proceedings and a final judgment was rendered in 1869, decreeing that these lands had been obtained by fraudulent practices.

That judgment had stood unimpeached, *directly* or *indirectly*, until this action was commenced—a lapse of about twenty years. If the laches of Dunklin Co. deprived her of relief, certainly the diligence of Butler County should be rewarded, and Butler Co. may invoke the reasoning of the Dunklin Co. case, *supra*, and insist that the laches of those claiming those lands adverse to the county, has estopped them from attempting to annul the judgment by which these lands were restored to the county. Our conclusion is that the judgment of the Circuit Court should be reversed and the cause remanded with directions to the Circuit Court to enter a decree dismissing the bill of plaintiffs.

All of this division concur.

(Signed) JAS. B. GANTT, *Judge.*

(Reported 121 Mo., 615.)

Thereupon and within proper time, the following motion for a rehearing was filed:

MOTION OF RESPONDENTS FOR REHEARING.

Now come the respondents in the above entitled cause, and move for a rehearing thereof upon the ground that the court has overlooked the following questions decisive of the case, which were duly submitted by counsel and were fully presented by the abstract on file, to wit:—

1. The court ignores the nature of the proceeding. The petition is a bill in equity, filed by a party who has itself or by its grantors, been in the actual or constructive possession of the lands involved since 1857, the date of the State patent, to quiet its title as against parties out of possession who claim an adversary interest, but have not for seventeen years asserted such interest.

2. The court imputes laches to a party *in possession* who has failed to quiet his title as against parties out of possession who had not up to the time of filing this suit done any act to require action on the part of the plaintiffs, and who have, so far as the record shows, for a long time recognized and allowed the title of the plaintiffs to be good.

3. The court refuses to impute laches to a defendant who for twenty years after a decree is rendered adjudging that it is the owner of the land, omits to assert its rights, recognizes its adversary's grantee as owner and assesses against and collects taxes from him for such period, and for all other practical purposes abandons its rights under the decree.

4. The court erroneously assumes that a party *in possession* is bound within any period known to the law or to equity, to institute proceedings to quiet his title.

5. The court fails to realize what the record clearly shows, that a decree which is inoperative, because indispensably necessary parties were not before the court, does not become operative by lapse of time; and that such decree, especially at the instance of one in possession of the lands involved and who has enjoyed such possession for at least twenty-five years under a party to the suit in which such decree was rendered, ought to be declared inoperative as soon as such defect of parties is suggested.

6. The court assumes that the respondent is not in privity with the defendant in the suit of Butler County *v.* The Cairo and Fulton Railroad Company, and therefore is not in position to have the decree therein vacated, whereas, it appears by the record that the respondent's title is derived, through the medium of the decree of foreclosure in the suit of Chouteau *v.* Allen and others, directly from the Cairo and Fulton Railroad Company whose directors and trustees were made parties defendant in said foreclosure proceeding.

7. The court assumes that the respondent has alleged the defect of parties "lest the evidence with respect to the main charge of fraud might be insufficient to satisfy the chancellor," whereas it appears by the pleadings and by the briefs and arguments of counsel that the charge of fraud was distinct from and independent of the point made with respect to the defect of parties, and that upon the latter ground alone, absolutely independent of the former, the decree should be vacated.

8. The court omits to take into consideration the uncontradicted evidence in the record that no pleading was in fact filed on behalf of either the railroad company or the trustees in the suit of Butler County *v.* The Cairo and Fulton Railroad Company, and assumes such fact, notwithstanding the admission of Chapman and the testimony of Bedford that neither they nor Owen ever pretended to appear either for the trustees or for the railroad company.

9. The court while admitting, for the purpose of its opinion, that the title to the lands involved was in November, 1869, well vested in the Cairo and Fulton Railroad Company, ignores this fact when it comes to judgment; and assumes that the court in the case of Butler County *v.* The Cairo and Fulton Railroad Company was justified in annulling that title on the ground of fraud, while the evidence here introduced shows, and Emerson frankly admits, that no evidence whatever was introduced to establish the charge of fraud, and that his effort was confined at the hearing to an attempt to show that no vote of the tax-payers of the county was ever taken with respect to the stock subscriptions of the various counties. In other words, the court while admitting as was decided recently by the Dunklin County case, in this court, and formerly by the case of Chou-

teau *v.* Allen, that *a vote was not necessary*, justifies a decree finding fraud on the sole ground that a vote was necessary and was not in fact taken.

10. The court decides that the Cairo and Fulton Railroad Company had not been dissolved in 1866 by the sale under the sell-out act, ignoring the terms of the act, which provided not only that the property but the franchises of the railroad should be sold, and ignoring the contemporary decision in the case of Moore *v.* Whitcomb.

11. The court in deciding that Mason Brayman was not an indispensable party defendant in November, 1866, mistakes the constitution of the *Board of Trustees* established by the deed of trust, and erroneously assumes that *Brayman* was incompetent to join in his own appointment; whereas the deed of trust shows (article 8) that the *Board of Trustees* consisted of the three original *title trustees*, and a fourth person appointed by them "of their own number or otherwise," and the record of the trustees shows that Mason Brayman was in 1858 duly appointed a member of the *Board of Trustees* by an order signed by all of the *title trustees;* and it appears further by the eighth article of the deed of trust, that *not the three title trustees*, but a majority of the *Board of Trustees*, of which board Mason Brayman was a duly constituted member, were empowered to fill a vacancy in the office of *title trustees.* Brayman, prior to 1866, although not a *title trustee*, was a member of the *Board of Trustees*, and as such was, in 1866, authorized by the deed of trust, in conjunction with the surviving *title trustees*, to join in an appointment to fill a vacancy. When, therefore, the appointment of March 22, 1866, was made, the *Board of Trustees* consisted of Wilson, Moore, and Brayman, Waterman having died in 1862. A majority of these three were by the deed of trust authorized to fill the vacancy. Wilson and Brayman constituted at that time such majority, and were, according to the deed of trust, authorized to appoint Brayman *title trustee* in lieu of Waterman. The mode of Brayman's appointment the court misconceives, and to such misconception is due its view with respect to the validity of his appointment.

12. The court ignores section 19, page 329, of the Revised Statutes of 1865, which provides that upon the dissolution

of a railroad company its directors shall be trustees to wind up its affairs, " with power to sue and be sued as such trustees." No one of the directors was joined as defendants in the Butler County case.

13. The court misconceives the effect of the section of the sell-out act, which exempts from sale the swamp lands conveyed by the counties to the railroad. This section does not indicate an intention to keep alive a corporation, but to save from sale lands which had prior to that time been conveyed by the company to secure its bonds.

14. The court misconceives the effect of an election which Bedford thought might have been held in 1867, since, if under the sell-out act the corporation had been dissolved, as was decided in Moore v. Whitcomb, an error of stockholders with respect to their rights could not have revived the corporation.

15. The court was in error in assuming that because Bedford became in 1867 a trustee under the mortgage he was bound, although not made a party to the suit, to answer. He did what he could by protesting that proper parties were not before the court and that some of the defendants were dead, thereby affording the court and the attorney for plaintiff an opportunity to avoid the error of proceeding to judgment without the presence of indispensable parties.

16. The court assumes that because Emerson was ignorant of the death of the trustees and of the dissolution of the railroad company, that he should be excused from joining the successors of the one and the trustees of the other as party defendants in the suit, although as an attorney in the case, having notice of the provisions of the deed of trust and of the mode in which successors to trustees should be appointed, he was bound to inquire whether or not the original trustees survived, and he was also bound to inquire whether or not the corporation had become dissolved. He admits that he made no effort to procure such information, and when these facts were suggested by Mr. Bedford at the trial, asserted that they were of no importance, and proceeded notwithstanding.

17. The court has misconceived the plaintiff's case, the nature and effect of the evidence introduced, the situation of the parties and the law involved. It has taken land from

a party who for many years has been in the exclusive and notorious possession of it; who had, according to the court's own admission, good title through its remote grantor the Cairo and Fulton Railroad Company, because a decree rendered in 1869, in a suit against two dead men and a dissolved corporation, wherein indispensable parties were not joined, declared without any proof whatever, according to the admissions of all parties and with the evidence in the record, that such title was fraudulently procured, notwithstanding the fact that for seventeen years no rights were ever asserted under said decree and the party in whose favor it was rendered continued during all of that time to recognize the grantees of its adversary as the owners of the lands and assessed against and collected from them taxes from year to year.

18. The court decides upon points which were not made by counsel for appellants and which were not urged by them in argument or in their briefs—points which we have had no opportunity to meet, yet which might be fully met and overcome by the record,

All of which is respectfully submitted, with the attached brief more fully discussing the various questions raised.

GEORGE A. MADILL,
LIONBERGER & SHEPLEY,
Attorneys for Respondents.

Said motion was overruled on the — day of ——, 1894.

The object of the present proceeding is to cause to be reviewed the record of the case in the Supreme Court of Missouri, and to reverse its judgment upon the ground that such judgment and the decree upon which the same was predicated, deprive plaintiffs in error of property without due process of law.

The assignment of errors is as follows:

IN THE SUPREME COURT OF THE UNITED STATES.

FREDERICK G. OXLEY AND THE F. G. OXLEY STAVE COMPANY, *Plaintiffs in Error*, *vs.* THE COUNTY OF BUTLER, THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILROAD COMPANY, AND THE ST. FRANCIS LUMBER CO.	In Error to the Supreme Court of the State of Missouri.

OCTOBER TERM, 1894.

ASSIGNMENT OF ERRORS.

On the seventh day of January, 1895, of the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Frederick G. Oxley and the F. G. Oxley Stave Company, by J. W. Warrington and Isaac H. Lionberger, their attorneys, and said that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the Supreme Court of the State of Missouri erred in refusing to vacate and annul the decree of the circuit court of Butler County in the suit of Butler County against the Cairo and Fulton Railroad Company and John Moore, John Wilson and Albert G. Waterman, trustees, upon the ground that before said suit was begun and before said decree was rendered, two of the defendants therein, to wit, John Moore and Albert G. Waterman, had died.

Second. That said court erred in refusing to vacate said decree upon the ground that before said suit was brought and before said decree was rendered, one of the defendants, to wit, the Cairo and Fulton Railroad Company, had been dissolved.

Third. That said court erred in refusing to vacate and annul said decree on the ground that the directors of the Cairo and Fulton Railroad Company were not made parties defendant in the said suit and summoned to appear.

Fourth. That said court erred in refusing to vacate and annul said decree upon the ground that Mason Brayman, trustee and successor to Albert G. Waterman, deceased, was not made a party defendant in said suit and summoned to appear, and that John Wilson, the sole surviving trustee, was not notified by summons served, but by publication only.

Fifth. That said court erred in approving, ratifying and establishing the decree of the circuit court of Butler County aforesaid, notwithstanding the death and defect of parties, aforesaid, thereby depriving the plaintiffs of property without due process of law.

Sixth. That said court erred in refusing to vacate and annul said decree upon the ground that it deprived the defendants in said suit and the plaintiffs in error claiming under them of property without due process of law.

Seventh. That said court erred in refusing to recognize and give effect to the title of plaintiffs acquired by adverse occupancy of the lands involved for the period prescribed in the Statute of Limitation of the State of Missouri.

Eighth. That said court erred in dissmissing the suit of the plaintiffs in error, whereas by the law of the land its judgment ought to have been given for the said plaintiffs and against the defendants, and there is no ground upon which the judgment of the supreme court can be sustained except that the decree aforesaid is valid and effectual.

And the said Frederick G. Oxley and the F. G. Oxley Stave Company pray that the judgment of the Supreme Court of the State aforesaid may be reversed, annulled and altogether held for naught, and that they may be restored to all things which they have lost by reason of the said judgment.

ISAAC H. LIONBERGER,
J. W. WARRINGTON,
Attorneys for Plaintiffs in Error.

SUMMARY.

Jan. 12, 1854. Cairo & Fulton R. R. Co. incorporated.

Dec. 9, 1856. Butler County subscribed for $100,000 of its capital stock and directed conveyance of 100,000 acres of swamp lands.

Apr. 20, 1857. Patent for 100,000 acres to R. R. Co.

May 27, 1857. Deed of trust made by R. R. Co. to Moore, Waterman and Wilson, trustees, and their successors.

May 7, 1858. Mason Brayman elected president of the board of trustees.

Feb. —, 1862. Waterman, trustee, died.

Mch. 22, 1866. Brayman appointed trustee in lieu of Waterman.

Sept. 23, 1866. Moore, trustee, died.

Oct. 1, 1866. Cairo & Fulton R. R. Co. dissolved by sale under Sell-Out Act.

Nov. 7, 1866. Suit of Butler Co. *vs.* C. & F. R. R. Co., Moore, Waterman and Wilson instituted.

Apr. 11, 1867. Bedford appointed trustee in lieu of Moore.

July 2, 1869. Decree of circuit court of Butler County in suit aforesaid vacating patent to and mortgage of R. R. Co.

Jan. 1871. Suit for foreclosure of mortgage instituted by Charles P. Chouteau *vs.* R. R. Co. and its directors, and Wilson, Brayman and Bedford and others.

June 21, 1882. Final decree of foreclosure by Supreme Court of Missouri.

Oct. 30, 1882. Lands sold under decree to Charles P. Chouteau.

Nov. 19, 1886. Lands purchased from Chouteau by plaintifis in error.

1882–1889. Lands assessed by county for taxation in name of Chouteau and grantees, plaintiffs in error in possession from date of conveyance to them.

Aug. 16, 1889. Plaintiffs in error brought suit in circuit court of Butler County to vacate its decree of July 2, 1869.

July 6, 1891. Decree for plaintiffs in error.

May 8, 1894. Judgment reversed by Supreme Court of Missouri.

Jan. 7, 1895. Writ of error sued out.

BRIEF.

I.

With respect to the validity of Butler County's subscription to the stock of the Cairo & Fulton Railroad Company, and of the patent made on behalf of the county by the Governor to satisfy said subscription, there can be no doubt.

Dunklin Co. *vs.* County Court, 23 Mo., 449;
Chouteau *vs.* Allen, 70 Mo., 327;
Dunklin Co. *vs.* Chouteau, 120 Mo., 577.

II.

The title so acquired by the railroad company devolved upon the plaintiffs in error through the mortgage of the railroad company, the decree of foreclosure rendered by the Supreme Court of the State of Missouri, the deed to Chouteau and the deed from Chouteau.

Chouteau *vs.* Allen, 70 Mo., 291;
Dunklin Co. *vs.* Chouteau, 120 Mo., 577.

III.

The decree of the circuit court of Butler County rendered July 2, 1869, in the case of Butler County *vs.* The Cairo & Fulton Railroad Company, John Moore, John Wilson and Albert G. Waterman, which purports to vacate and annul the patent to the railroad company made on behalf of the county, and the railroad company's mortgage to secure its bonds, was and is null, void and inoperative because—

When said suit was brought and when said decree was rendered, the legal title to the lands involved was not in said railroad company and said Moore, Waterman and Wilson, the defendants therein, but in the then directors of said

company and in John Wilson, Mason Brayman and Henry H. Bedford, the surviving and substituted trustees. None of the real parties in interest, except John Wilson, were made parties to or notified of the suit, and John Wilson was notified by publication only.

(*a*) The effect of the sale under the "sell-out act" was to extinguish and dissolve the Cairo & Fulton Railroad Company on the first day of October, 1866, and to vest the legal title to all of its property, subject to existing incumbrances, in its then board of directors.

Laws of Missouri 1853–4, p. 121, Secs. 11 and 12;
Laws of Missouri 1864–5, p. 107, Secs. 1, 3, 8 and 9;
Gen. Stats. Mo. 1865, p. 329, Sec. 19;
Moore *vs.* Whitcomb, 48 Mo., 543;
State Sav. Ass. *vs.* Kelley, 52 Mo., 588;
Chouteau *vs.* Allen, 70 Mo., 336.

(*b*) The death of A. G. Waterman and the substitution of Mason Brayman to be trustee in his stead on the 22d day of March, 1866; and the death of Moore and substitution of Bedford, operated to transfer the legal title to the lands here involved to Wilson, surviving, and Brayman and Bedford, the substituted trustees, for the purposes of the mortgage of May 23, 1857.

(*c*) In any suit affecting the title to the lands bought after October 1, 1866, the directors of the railroad company and Brayman were indispensably necessary parties.

Gen. Stats. of Mo., 1865, p. 651, Secs. 5 and 6;
Ford *vs.* R. R. Co., 52 Mo. App. 439;
Mallow *vs.* Hinde, 12 Wheat., 194–198;
Shields *vs.* Barrow, 17 How., 130;
Barney *vs.* Balto., 6 Wall., 280;
Gregory *vs.* Stetson, 133 U. S., 579;
Swan Co. *vs.* Frank, 148 U. S., 603;
People *vs.* O'Brien, 111 N. Y., 1.

(*d*) The judgment against the dissolved corporation and the dead trustees was a nullity.

Mumma *vs.* Potomac Co. 8 Pet., 281–286;
Bank *vs.* Colby, 21 Wall., 609–615;
Pendleton *vs.* Russell, 144 U. S., 640–645;
Bradley *vs.* Reppell, 32 S. W. Rep., 645; Sup. Ct. of Mo., Nov., 1895;
Combes *vs.* R'way, 27 L. R. A., 369;
People *vs.* O'Brien, 111 N. Y., 1;
Ford *vs.* R. R. Co., 52 Mo. App., 439;
Sergent *vs.* Ramsay, 89 Mo., 617;
Graves *vs.* Ewart, 99 Mo., 13.

(*e*) The decree of the circuit court of Butler County rendered July 2, 1869, in the suit begun November 7, 1866, is null, void and inoperative with respect to all parties having an interest in the property to be affected who were not joined in and notified of the suit. Due process of law necessarily involves an opportunity to answer and defend.

14th Am. Const. U. S.;
Hollingsworth *vs.* Barbour, 4 Pet., 466, 1830;
Shriver *vs.* Lynn, 2 How., 43–60, 1844;
Webster *vs.* Reid, 11 How., 438–459, 1850;
Thompson *vs.* Whitman, 85 U. S., 457–569, 1873;
Rees *vs.* Waterman, 86 U. S., 107–123, 1873;
Windsor *vs.* McVeigh, 93 U. S., 274;
Pennoyer *vs.* Neff, 95 U. S., 714, 1877;
Hagar *vs.* Reclamation Dist., 111 U. S., 701, 1883;
Scott *vs.* McNeal, 154 U. S., 34, 1893;
People *vs.* Essex, 70 N. Y., 229;
Russell *vs.* Grant, 122 Mo., 161–174;
Davis *vs.* R. R. Co., 126 Mo., 69–75.

IV.

A judgment void because rendered by a court without jurisdiction is always void: "A law or decree contrary to the fundamental law may at any time be declared so, al-

though it has been acted upon; for that which was wrong in the beginning cannot become valid in the course of time."

Dig. L., 50 Tit., 17, 24;
Powell *vs.* Gott, 13 Mo., 458;
Latshaw *vs.* McNees, 50 Mo., 381;
Ch. Justice Marshall in Strode *vs.* Justices, 1 Brock., 162;
Balsh *vs.* Shaw, 7 Cush., 284.

V.

The effect of the decree of the Supreme Court of Missouri herein is to approve, ratify and establish the void decree of the circuit court of Butler County, and to thereby deprive plaintiffs in error of property without due process of law.

VI.

The sole object of this proceeding, as the record shows, was to try the title to the lands involved, as between the defendants, Butler County and its grantees, claiming under the void decree of the circuit court of Butler County, and the plaintiffs claiming under the State patent and the deed of trust which that decree purports to vacate and annul. A right, title, privilege and immunity within the meaning of the XIV Amendment of the Constitution of the United States, and section 709 of the Judiciary Act were specially set up and claimed, and the decision of the Supreme Court of Missouri was against said right, privilege and immunity.

Bridge Proprietors *vs.* Hoboken, 1 Wall., 116;
Chicago Ins. Co. *vs.* Needles, 113 U. S., 574;
Des Moines Co. *vs.* Iowa Co., 123 U. S., 552;
Kaukaura Co. *vs.* Canal Co., 142 U. S., 254;
Saywood *vs.* Jenney, 158 U. S., 180.

VII.

There is no independent ground disclosed by the record which justifies the decision of the Supreme Court of Mis-

souri. Its declaration that the plaintiffs in error have been guilty of laches is without foundation in the record, since it appears that the plaintiffs have for many years been in possession of and paid taxes upon the lands. A party in possession is not bound to institute litigation until it becomes necessary for his protection.

Moreover, it appears from the opinion filed, that the Supreme Court of Missouri regarded the decree of the circuit court of Butler County as irregular merely and not as void, and that they refused to cure an "irregularity" after twenty years. Laches is imputed only upon a false assumption with respect to the character of said decree. The sole ground of the opinion is that a decree which the petition asserts to be void is voidable merely. If the decree be void and not voidable as the court assumes, the doctrine of laches cannot be applied. Whether it be void or not is a Federal question. If it deprived plaintiffs' grantor of property without a hearing it is void, and the judgment of the Supreme Court of Missouri, which ratifies and establishes it, is violative of the Constitution of the United States.

Sharon *vs.* Tucker, 144 U. S., 533;
Strode *vs.* Justices, 1 Brock., 162;
Baker *vs.* Kelly, 11 Minn., 480–495;
Powell *vs.* Gott, 13 Mo., 458;
Latshaw *vs.* McNees, 50 Mo., 381.

ARGUMENT.

This suit was brought to settle the title to 44,000 acres of swamp land in the county of Butler, State of Missouri. The plaintiffs in error, or their grantors, have been in possession of the lands and paid taxes thereon since 1881.

On the 13th day of November, 1888, the defendant, The St. Louis, Iron Mountain and Southern Railway Company, brought suit in the Circuit Court of the United States for the eastern district of Missouri, against the plaintiffs to recover possession of these lands (Trans., p. 53).

This suit was dismissed. Thereupon, in order to remove the cloud upon plaintiffs' title cast by a certain decree of the Circuit Court of the County of Butler rendered in 1869, upon which said railroad company and the County of Butler rely, the present proceeding was begun.

Both parties derive title from the same ultimate source, to wit, an act of Congress approved September 28, 1850, granting swamp lands to the State of Missouri, and acts of the Legislature of Missouri donating said lands to the counties in which they lie.

The plaintiffs in error claim under certain acts of the Legislature of Missouri authorizing Butler County to subscribe to the stock of the Cairo & Fulton Railroad Company and pay its subscription in said lands; the subscription of said county to $100,000 of the stock of said company; the patent, made in 1857 on its behalf and by its order, by the Governor of Missouri, conveying to said company 100,000 acres of said lands to satisfy said subscription; the mortgage made in 1857 by the railroad company to secure its bonds; the decree rendered by the Supreme Court of Missouri in 1882 foreclosing said mortgage and directing a sale of the lands to satisfy said

bonds; the deed of the commissioner of said court, made pursuant to said decree, conveying the lands to Charles P. Chouteau, and the deed of Charles P. Chouteau to plaintiffs in error.

The defendants rely upon a decree of the Circuit Court of Butler County rendered July 2, 1869, in a suit brought November 7, 1866, against The Cairo & Fulton Railroad Company, John Wilson, Albert G. Waterman and John Moore, which purports to vacate and annul the patent and mortgage aforesaid made in 1857. The object of the present suit is to vacate and annul said decree upon the ground that it deprived plaintiffs' grantor of property without notice and without a hearing.

Plaintiffs allege, and so it appears from the record, that the suit in the court in which said decree was rendered was brought against The Cairo & Fulton Railroad Company, John Wilson, John Moore and A. G. Waterman, the parties originally entitled under the patent and mortgage aforesaid; but that prior to the commencement of said suit, the railroad company had been dissolved and extinguished and the legal title to all of its property had passed under the laws creating and controlling it, to its directors; and two of the trustees sued, to wit, A. G. Waterman and John Moore, had died, and successors to them had been appointed in the mode provided by the deed of mortgage, so that title under the mortgage had passed from said dead trustees and devolved upon said successors. Neither the directors of the defunct railroad company nor the substituted trustees were joined as parties to or notified of said suit. Plaintiffs contend that a decree rendered under such circumstances was null and void and ineffectual to divest or affect the title which they subsequently acquired under the decree of foreclosure rendered by the Supreme Court of Missouri in a suit to which the directors of the railroad company and the surviving and substituted trustees were made parties.

The Circuit Court of the city of St. Louis, before whom the case was tried, found for the plaintiffs and rendered a decree accordingly. Upon appeal the Supreme Court of Missouri reversed this judgment and directed a dismissal of plaintiffs' bill with respect to appellants. To reverse this judgment of the Supreme Court of Missouri, the plaintiffs sued out of this court a writ of error, assigning as grounds for its intervention that the decree of the Circuit Court of Butler County rendered July 2, 1869, deprived them of property without due process of law and that the decision of the Supreme Court of Missouri was against the immunity from said decree claimed by the plaintiffs.

I.

Jurisdiction of this court.

The only question that can arise with respect to the jurisdiction of the court depends upon the manner in which the immunity contended for is presented by the record. The Constitution of the United States declares that no person shall be deprived of property without due process of law.

Section 709 of the Revised Statutes provides that a final decree in any suit in the highest court of a State in which a decision in the suit could be had, where any title, right, privilege or immunity is claimed under the Constitution of the United States, and the decision is against the title, right privilege or immunity specially set up and claimed, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error.

Did the plaintiffs in error specially set up and claim immunity from the decree of the Circuit Court of Butler County upon the ground that it deprived them of property without due process of law?

The petition filed in the suit (Trans., p. 12), after setting forth with particularity the various acts, orders, instruments

and decrees whereby the plaintiffs acquired title to the lands involved, alleged that after the Cairo & Fulton Railroad Company had acquired title to the lands, and had issued its bonds, and made, executed and delivered a deed of trust on all of said lands to secure said bonds,—

"The County of Butler, not regarding its said actions and the proceedings of its said County Court, not regarding the rights of said railroad company and its grantees, and contrary to equity and justice, to wit, on November 7, 1866, filed in the Circuit Court of said Butler County its petition against the Cairo & Fulton Railroad Company, John Moore, John Wilson and A. G. Waterman, trustees aforesaid, for the purpose of canceling and setting aside the said patent from the State of Missouri to the Cairo & Fulton Railroad Company and the deed of trust from said railroad company to Moore, Waterman and Wilson, trustees as aforesaid; that in said proceeding service was attempted to be had by publication, the plaintiffs in said cause alleging that said Moore, Waterman and Wilson were non-residents of the State of Missouri; that in the said proceeding the said Cairo & Fulton Railroad Company was brought in, as was pretended, by personal service, but your complainants herein aver, charge and show the fact to be that the service in said cause, the pretended appearance of the defendants by their attorneys and in their own proper persons, was in fact a fraud and deception imposed upon the Circuit Court trying said cause; that in truth and in fact the said Waterman, previous to the bringing of said action in said Circuit Court, and the said Moore, soon after the bringing of said action and before service upon him had been obtained, had departed this life and their successors in said trust deed as trustees had been appointed in pursuance of the provisions of said deed of trust; that in consequence of said deaths and the appointment of their successors as such trustees, as aforesaid, no service was had in said cause, the new trustees were not made parties, were not served with process, and had no notice of the proceedings, although necessary and proper parties.

The other defendant in said cause, to wit, the Cairo & Fulton Railroad Company, was not a necessary or proper

party as by the foreclosure of the State's lien on said railroad, under what is known as the 'sell-out' act, and the purchase of said railroad under said sale, the said company before the commencement of said suit was dissolved and ceased to exist, and could not legally be made a party to said proceedings; that the only party defendant to said proceedings that was in fact present or pretending to make a defence in said action was Green L. Poplin, who had at one time been the president of said railroad company, but long previous to the bringing of said suit had ceased to be connected with said company in any capacity whatever, but was in fact acting in collusion with the attorneys and agents of said Butler County, to aid said Butler County and its attorneys to avoid and disregard their contract made with said Cairo & Fulton Railroad Company. And these complainants aver and charge the fact to be that notwithstanding the fact that said Circuit Court proceeded to find the issues in said case for the said County of Butler, and to decree that the said deed from the State of Missouri to the Cairo & Fulton Railroad Company and the deed of trust from said company to Moore, Waterman and Wilson be canceled and set aside and for naught held, and that the interests of the defendants therein be divested out of them and invested in said County of Butler, that all said pretended proceedings were null, void and of no effect whatsoever on account of collusion of parties thereto, *and because the parties holding the legal title under said* deed of trust for the holders of the bonds of the Cairo & Fulton Railroad Company, *were not parties to said suit* and did not appear therein either in person or by attorneys, and because neither said bondholders nor their assigns were in court by service of process or otherwise."

The prayer for relief asked (Trans., p. 21) that—

"the said several conveyances from Butler County, made subsequent to the patent from the State of Missouri to the railroad company be declared by the decree of the honorable court canceled and set aside; that the mesne conveyances from said Butler County to the said several claimants hereabove set out be canceled, annulled and set aside and in all things held for naught; that the claimant's title above men-

tioned, and also the claim of Butler County to any of the lands in this petition described, be declared null and void and of no effect, and that all of said conveyances be declared to be a cloud upon the title of said conveyances and, therefore, null and void and of no effect whatever, and that the title of the plaintiffs be declared to be the paramount title to all the lands in the petition above, and that the plaintiffs have such other and further relief in the premises as to equity and good conscience should seem meet."

It will be observed that the petition asks relief upon two grounds: First, That the decree complained of be vacated because procured by fraud; Second, That it be vacated because—to quote the language of the petition—"the parties holding the title under said deed of trust for the bondholders of the Cario & Fulton Railroad Company were not made parties to said suit and did not appear thereto, either in person or by attorneys."

With respect to the first of these grounds, the finding of the Supreme Court of Missouri is conclusive and cannot be reviewed here, inasmuch as it involves no Federal question. With respect, however, to the second ground urged against the decree, to wit, that it deprives the parties in interest of property without a hearing, this court has undoubted jurisdiction to review the judgment of the Supreme Court of Missouri.

Upon this point the record shows that at the trial evidence was introduced to prove that when the suit of Butler County against the Cairo & Fulton Railroad Company, John Moore, John Wilson and A. G. Waterman was instituted, and long prior to the rendition of the decree complained of, two of the parties, to wit, A. G. Waterman and John Moore had died; the Cairo & Fulton Railroad Company, another defendant, had been dissolved and its property transferred by the law controlling the corporation to its directors; Mason Brayman had been duly constituted trustee,

as successor to A. G. Waterman; and neither the directors of the railroad company nor Mason Brayman had been made parties to or notified of the suit. Upon these grounds it was insisted that said decree was in law null and void and ineffectual to affect or divest the interests attacked. Upon these grounds the Circuit Court of Butler County was asked to vacate said decree and declare it to be null and of no effect.

To procure the formal vacation of said decree upon the ground that it deprived the parties in interest of their property was, therefore, the chief object of this proceeding. The pleadings and the record distinctly show that immunity from the decree complained of was asserted at the commencement, and reasserted throughout the progress of the suit. The controversy was almost entirely confined to the one issue, whether said decree was void by reason of the considerations urged against it or not. This appears from the opinion of the court before whom the case was first tried. Two-thirds of the opinion of the Circuit Court of the city of St. Louis is devoted to the consideration of said decree, and the objections urged against it. By way of conclusion the court says:

"For this want of necessary parties I am of opinion that that decree did not affect the title conveyed by the deed of trust, for it must be borne in mind that none of the owners or holders of the bonds secured by this deed of trust, the real beneficiaries, were parties to this suit (Trans., pp. 19–20)."

This also appears from the opinion delivered by the Supreme Court of Missouri. That court began its opinion with the statement (Trans., p. 21):

"This is a suit in equity to set aside a decree in favor of Butler County, rendered at the July term of the Circuit Court of Butler County, in 1869, to cancel certain deeds and

patents, among them a patent from said county to the St. L., I. M. and S. R. R. Co., and to quiet the title to the lands mentioned in said decree."

In the course of its opinion (Trans., p. 27), the court says:

But two questions are presented by the record for the determination of this court.

First. Were the subscriptions by the County Court of Butler County, to the stock of the Cairo & Fulton Railroad Company and the conveyances of swamp lands of that county to said railroad in satisfaction of said subscriptions, authorized by law?

Second. *Ought the decree of the Circuit Court of Butler County annulling the conveyances of said lands* be set aside for the reasons urged by the plaintiffs, to wit: first, because procured by fraud; second, *because two of the defendants named in it were dead at the time of its rendition, and the railroad company was a dissolved corporation.*

In the discussion of the second question, with relation to the validity of the decree, the court fills nearly seven pages of its printed opinion, and concluded that notwithstanding the "irregularity" complained of, the decree ought not to be distrubed. (Trans., pp. 31–37.)

In view of the allegations of the petition, the evidence disclosed by the record, and the language of the inferior and Supreme Court of Missouri, there can be little doubt that plaintiffs in error have at and since the institution of this proceeding insisted upon immunity from the decree of the circuit court of Butler County rendered July 2, 1869, upon the ground that the real parties interested in the property affected by the decree were not notified of the suit and allowed an opportunity to defend. Whether an immunity secured by the Constitution of the United States was "specially set up and claimed" within the meaning of the judiciary act ought not to be doubted. It has never been

decided by this or any court that in order to confer jurisdiction upon this court it must appear that the plaintiff in error has somewhere declared *ipsissimis verbis* of the statute, that he asserted and relied upon the Constitution of the United States and the rights, privileges and immunities thereby secured.

In the case of Crowell *vs.* Randall (10 Pet., 368), Mr. Justice Story said that to bring a case within the judiciary act it is necessary—

First. That some one of the questions stated in that section did arise in the State court.

Second. That the question was decided by the State court as required in the same section.

Third. It was not necessary that the question should appear on the record to have been raised and the decision made in direct positive terms *ipsissimis verbis*, but that it was sufficient if it appeared by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment."

In a subsequent case, Mr. Justice Catron (Armstrong *vs.* Treasurer, 16 Pet., 281), declared that the question on which the proceedings of the court rested must appear—

Either by express averment of by necessary intendment in the pleadings in the case, or from the record, that the question was necessarily involved in the decision and that the State court could not have given the decree which they passed without deciding it.

Mr. Justice Miller (Bridge Proprietors *vs.* Hoboken, 1 Wall., 142), in discussing the cases on this subject, said:

"It would be a new rule of pleading and one altogether superfluous to require a party to set out specifically the provision of the Constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything

without pleading it specially, it is the Constitution of the United States. And if plaintiffs and defendants in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say, in words, 'This is the paragraph of the Constitution involved in this case.'"

In the case of the Chicago Insurance Co. *vs.* Needles (113 U. S., 579) it was held that where the question is in writing presented at the hearing, it is not necessary that the State court shall, in terms, pass upon the claims distinctly made, provided the final judgment necessarily involves an adjudication of that claim.

In the case of Des Moines Navigation Co. *vs.* Iowa Co. (123 U. S., 552) the answer filed in the suit alleged that a certain judgment referred to was "null and void for the reason that the courts of the United States had no jurisdiction of said suit and no legal authority or power to render such judgment." The State court, in deciding this case, disregarded the point, because counsel had not in their briefs discussed it; but this court says that such reason was insufficient because the point was fairly presented by the pleadings, proofs, and assignment of errors, and was necessarily involved in the determination of the case (p. 555).

In the case Kaukaura Co. *vs.* Green Bay Co., (142 U. S., 269), this court held that although the validity of a statute of Wisconsin reserving to the State the waters of a certain river "was not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court," yet this court had jurisdiction because "it was evident that the State court could not have reached a conclusion averse to the defendant without holding that no property of the defendant had been taken without due process of law."

In the still later case of Saywood *vs.* Denny (148 U. S., 181), Mr. Chief Justice Fuller, reviewing the authorities on

this subject, said that it is sufficient to confer jurisdiction upon this court if—

It appears from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision. (Page 184.)

The last case to which the attention of counsel has been drawn (Cornell *vs.* Green, 163 U. S., 79), seems to have been decided upon the notion that the case depended below upon a question of chancery practice and not of constitutional right; and that the constitutionality of a law of the United States was not necessarily, but "incidentally" drawn in question. (P. 80.)

In the light of the foregoing authorities there can be no doubt that this court has jurisdiction of the present case. The validity of the decree of the Circuit Court of Butler County was attacked upon the ground that it purported to vacate and annul a patent and mortgage, where the parties in interest had no opportunity to be heard. It nowhere appears that the provision of the Constitution of the United States which declares that no person shall be deprived of property without due process of law, was in terms specifically set forth; but it does appear by "clear and necessary intendment" that an immunity guaranteed by the Constitution of the United States was asserted by the pleadings, insisted upon at the trial, and passed upon by the court. The constitutional question was necessarily involved. Without assuming that the Federal Constitution was invoked and an immunity guaranteed by it was relied upon, the pleadings, the evidence, the decisions of the courts are motiveless and meaningless. The petition alleges that the decree com-

plained of was null and void *because the parties to be affected were not notified.* Proof was made of the fact. The lower and supreme courts of the State devoted the larger parts of their decisions to a discussion of the sufficiency of the evidence to warrant the vacation of the decree *upon this ground.*

It was assumed by the court, as well as by counsel, that if the facts alleged were sufficient in law to warrant the relief asked, the relief would be granted. The law involved was necessarily the Constitution of the United States. This was the only law fundamental and paramount which declares in terms that property may not be taken without a hearing. That all parties, and the courts, had this law in mind and understood that an appeal was being made to it, must be conclusively presumed from what they did and what they said. The allegations and proofs and opinions set forth in the record in this case establish beyond the possibility of doubt that a Federal right, secured by the Federal Constitution, was set up and relied upon by the plaintiffs and denied by the Supreme Court. The plaintiffs "in their pleadings made a case which necessarily came within some provision of Federal Constitution and this Court surely can recognize the fact without requiring the pleader to say in words, 'This paragraph of the Constitution is the one involved in this case,'" to quote the language of Mr. Justice Miller.

There was no appeal for relief to irresponsible power, but an advised assertion of right before a tribunal administering the law known to all persons and invocable by all. We pleaded the facts. We proved the facts. We relied upon the law. The court below decided that the facts established did not warrant the relief prayed for under the law relied on. It decided against the claim of immunity set up, because in its opinion the facts proved did not justify the claim. If the facts had, in its opinion, justified the claim,

there cannot be the slightest doubt that the court would have vacated the decree of the Circuit Court of Butler County, because said decree was rendered in violation of the Federal law.

If it be assumed that this court has jurisdiction of the case, it remains to determine whether the facts established by the record justify its intervention.

II.

Plaintiffs' Title.

The deraignment of plaintiffs' title is hereinbefore fully set forth. (*Ante*, pp. 4–14.)

The lands involved are part of the swamp lands granted by the United States to the State of Missouri by the act approved September 28, 1850. These lands were thereafter donated by the State to the counties in which they lie. In 1853 the Legislature of Missouri passed an act entitled "An Act to authorize the formation of railroad associations and to regulate the same," which provided that the county courts of the various counties may subscribe to the stock of any railroad company organized under the act and may mortgage or sell the swamp lands of the county to pay its subscription. The act further provides that the county courts subscribing or proposing to subscribe, may for information take a vote to ascertain the sense of the tax-payers with respect to the subscription and the manner in which it should be made.

The Cairo and Fulton Railroad Company was organized under this law as its articles of association show, and in the year 1854, by orders dated respectively July 24, and August 24, the County Court of Butler County subscribed for $100,000 of the stock of the company. These orders were ratified and confirmed by subsequent orders dated December 6, 1855. (Trans., pp. 30–32.) On the 10th day of

December, 1855, the Legislature of Missouri passed an act which authorized the county court of any county to subscribe to the stock of any railroad corporation that may run through the county, and satisfy its subscription in swamp lands at an agreed valuation. The Cairo & Fulton Railroad Company was projected and did in fact run through Butler County. On the 9th day of December, 1856, the County Court of Butler County directed that a conveyance of 100,000 acres of the swamp lands of the county be conveyed to the railroad in satisfaction of the subscription of $100,000 to its stock theretofore made. (Trans., p. 33.)

Pursuant to these various orders, the Governor of the State of Missouri made on the 20th day of April, 1857, a patent conveying the lands in controversy to the Cairo & Fulton Railroad Company in satisfaction of the subscription of Butler County to its stock. Thereupon, the company issued to the county a certificate for $100,000 of its stock, which certificate has ever since been retained by the county.

On the 27th day of May, 1857, the railroad company made a deed of trust conveying all of the lands derived from Butler County and other counties to John Moore, John Wilson and Albert G. Waterman, trustees, to secure the payment of 1,600 bonds of $1,000 each. The greater part of these bonds were thereafter acquired by Charles P. Chouteau, who, upon the railroad company's default in the payment of the same, brought suit for the foreclosure of the mortgage whereby they were secured, in December, 1871. This suit resulted in a decree of foreclosure rendered by the Supreme Court of the State of Missouri, in June, 1882, whereby the commissioner of the court, one John H. Fisse, was directed to sell said lands to satisfy said bonds. Fisse accordingly sold the lands to Charles P. Chouteau, and pursuant to said sale made a deed dated October 30, 1882, conveying all of said lands to said Chouteau. The plaintiffs in

error acquired said lands by deed from Chouteau dated November 19, 1886.

With respect to the validity of the title so derived by plaintiffs in error no doubt can now arise. Before the transfer of the lands here involved to the railroad company, by the Governor of the State, the Supreme Court of Missouri held, in a suit brought to test the question, that the County of Butler had the right to make such a disposition of the lands as was contemplated. It so held in a suit brought by the County of Dunklin against the District County Court for Dunklin, Butler, and other counties, to restrain said District Court from consummating a transfer of lands which it had ordered on behalf of Dunklin County. After a full consideration of all the questions raised, the Supreme Court decided in distinct terms that under Section 29 of the general railroad law, the county court of Dunklin was empowered to subscribe on behalf of the county for stock in the Cairo & Fulton Railroad Company; and by Section 32 of the same act the county court was expressly authorized to sell its lands and pay such subscription. The court concluded, after consideration of the various laws involved: "It is manifest that the county court had authority to dispose of the swamp lands as it had done."

The respondent in the said cause was, as we have indicated, the District County Court, acting not only for Dunklin County, but for Butler County; and said court, acting for Butler County, had, prior to said decision, made the orders hereinbefore referred to, directing a transfer of the lands of said county to the Cairo & Fulton Railroad Company to satisfy that county's subscription to its stock. The case seems to have been brought for the purpose of ascertaining whether or not said court was authorized to make such disposition of lands by the various acts of the Legislature of Missouri, to which reference has been made. After

the judgment in the case was rendered, the court proceeded, on behalf of all the counties which it represented and which had subscribed to the stock of said road, to carry into effect the orders theretofore made for the transfer of swamp lands.

Dunklin County *vs.* District County Court for Dunklin and Butler Counties, 23 Mo., 449, 455, 456—1856.

After the transfers of lands on behalf of the counties had been made, a question was again raised with respect to the validity of such transfers, and the Supreme Court of the State again affirmed their validity in unqualified terms. In this suit, Thomas Allen, one of the defendants, alleged in his answer that the Cairo & Fulton Railroad Company had never acquired the legal title to the swamp lands here involved, and that he himself was the owner thereof by virtue of a conveyance from Butler County. (Trans., pp. 36–37.) He further urged that the mortgage of the railroad company had never been delivered and did not constitute a lien upon the lands. The Supreme Court found against Allen on both of these propositions, and affirmed in the most unequivocal manner that the title to the lands had passed to the company and its mortgage was a valid incumbrance. Plaintiffs' grantor was plaintiff in this suit.

Chouteau *vs.* Allen, 70 Mo., 290, 324, 327—1879.

In a still later case, brought for the very purpose of forever settling all doubt with respect to the validity of the transfers of the swamp lands, made on behalf of the various counties to the Cairo & Fulton Railroad Company, the same conclusion was again reached by the Supreme Court.

Dunklin County *vs.* Chouteau, 120 Mo., 577.

In the present case the validity of the title acquired by the railroad company was again questioned. The Circuit

Court of St. Louis, before whom the case was tried, held that it was precluded from further consideration of the question by the decision of the Supreme Court in the case of Chouteau *vs.* Allen (*Ante*, 18), which declared, in response to Allen's contention that he had become the owner of the lands from Butler County in 1869, and that the deed to the railroad company was invalid—

"that the inquiry is narrowed down to the point whether the title to the swamp lands was in the Cairo & Fulton Railroad Company at the time the deeds of trust were executed"—

and affirmed in plainest terms that such title was vested in said company at that time.

Nothing was said by the Supreme Court in the present case which can be construed to disapprove or criticise the prior adjudications of the court on the subject, and we therefore conclude that no question can now be raised with respect to the validity of the patent, whereby the railroad company acquired title to the lands or of the mortgage made by it to secure its bonds.

The Circuit Court of Butler County, which made the decree complained of, seems to have been of opinion that the patent of the Governor was procured by fraud, and on this account annulled it and the subsequent deed of trust; but, as we shall presently show, this decree was rendered in an *ex-parte* proceeding without notice to the parties affected.

III.

The decree of the Circuit Court of Butler County rendered July 2, 1869, which purports to vacate and annul the patent to the railroad company and the mortage made to secure its bonds, is a nullity.

The object of the present proceeding was to vacate and annul the decree of the Circuit Court of Butler County ren-

dered July 2, 1869. To accomplish this object, the present suit was brought in the court that rendered the decree, by the plaintiffs in error claiming title under the parties affected, against all others claiming an interest therein under said decree. The suit is in the nature of a writ of error *coram nobis*. The bill charges that said decree was procured by fraud; that when the suit of Butler County was brought, and when the decree therein was rendered, the Cairo & Fulton Railroad Company, one of the defendants. had been dissolved; two of the trustees sued, to wit, John Moore and Albert G. Waterman, had died; and neither the directors of the railroad who succeeded to its property, upon its dissolution, nor the substituted trustees, who succeeded to the title upon the death of the original trustees, were made parties to, or notified of the suit.

Omitting from consideration the charge of fraud, which in view of the opinion of the Supreme Court on that branch of the case, is no longer open for discussion, we submit the following argument with respect to the remaining objections urged against the decree. These objections may be briefly stated to be, when the suit was brought and when the decree was rendered:

1. The defendant railroad company had been dissolved;
2. Two of the defendant trustees had died;
3. The property of the company had passed to its trustees;
4. Mason Brayman had been appointed trustee in lieu of Waterman, trustee, deceased; and Bedford in lieu of Moore, trustee, deceased;
5. Neither the directors of the railroad company, Mason Brayman, nor Bedford were joined as parties to, or notified of the suit.

All of these objections were urged in the petition and before the Circuit and Supreme Courts of the State.

1. Dissolution of Railroad Company.

The suit of Butler County *vs.* The Cairo & Fulton Railroad Company was brought *November 7, 1866.* The decree of the court was rendered *July 2, 1869.* (Trans., pp. 40-88-104.)

It appears by the record that the Legislature of Missouri by an act ayproved December 11, 1855 (*Ante*, p. 8 ; Trans., p. 85), authorized the Governor of the State to issue to the Cairo and Fulton Railroad Company not exceeding $250,000 of State bonds to aid in its construction, which should be obligations of the company and become a first lien on all of its road and property, in favor of the State. Section 11 of this act provided that if the company should default in the payment of principal or interest of the bonds, the Governor should sell the road and its appurtenances and buy it for the use of the State.

The bonds so authorized were accordingly issued to the road. Prior to 1866, during the war, all the property of the company was destroyed and it failed to pay the interest on said bonds. Thereupon, the Legislature passed an act entitled "An Act to provide for the sale of certain roads and property and to foreclose the State's lien" (*Ante*, p. 8), and known as the "Sell-out Act," which directed certain commissioners of the State to "sell every part and section of the road of said company, so far as the same is constructed or projected, together with its property of every description, and all *rights and franchises* thereto belonging, at auction to the highest bidder." The 9th section of the act (*Ante*, p. 9) further provided that the company or person purchasing the road should have all the *rights, franchises and immunities* of said company under its charter and the laws amendatory thereof. (*Ante*, p. 8.)

Pursuant to this act the *road, property* and *franchises* of the Cairo & Fulton Railroad Company were sold on the 1st

day of October, 1866, and purchased by the State of Missouri (*Ante.*, p. 10). A formal deed of conveyance was made and delivered, reciting the acts and proceedings aforesaid, and describing the *road, property and franchises* of the company in *haec verba*. (Trans., 44.)

We submit that this sale, so made and so consummated, operated to dissolve the corporation and extinguish the life of the Cairo & Fulton Railroad Company. In support of this position we are able to cite two decisions of the Supreme Court of Missouri, rendered with respect to this very company, upon consideration of the very facts which we have herein set forth.

The first case, decided in 1871, involved the propriety of suing the directors of said corporation to enforce one of its obligations. The sole question presented for adjudication was: Did the sale, under the "Sell-out Act," made October, 1, 1866, operate to extinguish and dissolve the Cairo & Fulton Railroad Company? and the court held, all the judges concurring—

> That the seizure and sale under the State lien *extinguished* the Cairo & Fulton Railroad Company; such seizure and sale destroying the objects for which the corporation was instituted. Upon the whole we are disposed to hold in accordance with Slee *vs.* Bloom that the facts alleged in the petition sufficiently show a *dissolution* of the corporation by a practical surrender and abandonment of its corporate rights and franchises.
>
> Moore *vs.* Whitcomb, 48 Mo., 453, 1871.

The facts showing the "practical surrender" by the company of its corporate franchises, referred to by the court, are established in the present case by the deposition of Bedford, who testified that the work of construction was abandoned when the war began; that during the war all the

property of the company was destroyed or stolen, and that no effort had since been made to rehabilitate the property. (Trans., p. 63.)

In the subsequent case of Chouteau *vs.* Allen (the foreclosure proceeding), the consequences of the sale aforesaid, again came up for the consideration of the Supreme Court. In this case Chouteau, as bondholder, sued not only the corporation by name but its directors as its trustees, alleging its dissolution. The court, following Moore *vs.* Whitcomb, decided that—

In consequence of the sale October 1, 1866, the Cairo & Fulton Railroad Company *ceased to exist as* a corporation. (Chouteau *vs.* Allen, 70 Mo., 336.)

In the briefs heretofore prepared in the course of the present proceeding, we cited the foregoing cases and relied upon them as authority for the proposition that the Cairo & Fulton Railroad Company was dissolved and extinguished October 1, 1866.

These cases are not expressly overruled by the court in the present case. It says (Trans., p. 132)—

The decision of Moore *vs.* Whitcomb, 48 Mo., was upon demurrer only. Whether the court with all the facts and the provisions of the "Sell-out Act" before it would have held the corporation dissolved for all purposes, we greatly doubt, but it is clear that the president, Poplin, was in court and no suggestion of dissolution was pleaded; and if the corporation was dissolved, the failure to proceed against the president and directors, as trustees, was simply an irregularity that might have been amended if seasonably prayed, but is no ground for now vacating said judgment after this lapse of time, at the instance of one who was neither a creditor nor stockholder at the time. (Trans., p. 132.)

The court then suggests that the corporation could not have been dissolved, because after the date of its dissolu-

tion, directors seem to have been elected from time to time, and other acts done which could only have been done by an existing company—including the very appointment of Bedford, to which we hereafter allude. (Trans., p. 129.)

The answer is that where a corporation has been legally dissolved, the acts of its members cannot revive it. The deed appointing Bedford does not purport to be the act of the dead company, *but of its directors*, and the law expressly provided that upon the dissolution of the company its directors should have its powers for the purpose of winding up its affairs.

The court also alluded to an act of the Legislature of Missouri, approved in 1868 (Trans., p. 129), which, in the opinion of the court, seems to have been a legislative recognition of the existence of the company. This act authorizes the county courts of the various counties that took stock in the Cairo & Fulton Railroad to appoint agents to look after their interests, and required the "*old company*" to turn over to such agents all unappropriated lands. We submit that the act is conclusive proof that in the opinion of the Legislature the company had been dissolved. It refers to it as the *old* company, and directs certain things to be done in *the settlement of* its affairs. It cannot, with any show of reason, be contended that such an act for such a purpose revives the dead corporation. Moreover, this act was passed before the decisions in the cases of Moore *vs.* Whitcomb, and Chouteau *vs.* Allen, and presumably was then considered and given its proper weight. These cases affirmed most unequivocally that the corporation was dissolved October 1, 1866.

The Supreme Court seems, however, in the present case to have assumed that the corporation was dissolved, notwithstanding the considerations suggested, and holds that nevertheless the decree was not void but merely "irregular," and that the irregularity might have been cured "if seasonably prayed."

We have never objected to the decree merely upon the ground that the corporation had been dissolved when the suit was brought, but because said decree purports to vacate a deed to the corporation and divest certain rights of property which, in virtue of the dissolution, has passed from the corporation and devolved upon its directors, as trustees. Yet it is well settled law that a judgment against a dissolved corporation is not merely irregular, but void in the sense that a judgment against a dead man is void.

Morowitz on Corps., sec. 1031;
Mumma *vs.* Potomac, 8 Pet., 286;
Bank *vs.* Colby, 21 Wall., 609;
Pendleton *vs.* Russell, 144 U. S., 640.

The record shows that the Cairo & Fulton Railroad Company was a nominal party to the foreclosure proceeding under which plaintiffs claim. This mere fact does not invalidate the decree of foreclosure, because the suit was also against the directors of the corporation, upon whom its property devolved after its dissolution. We complain of the Butler County decree because the dissolved company was the *only* party, and the directors were not joined or notified. Such a decree is void absolutely and ought not to be permitted to affect property rights which the directors only had power to represent.

2. Death of two defendant trustees.

With respect to this point little need be said. That a judgment against a dead man is void is too well settled to require discussion. We proved the death of Moore and Waterman prior to the commencement of the suit of Butler County, to contradict the recitals of the decree with respect to the appearance of said trustees "in person and by attorney" and lay the foundation for proof of the appointment of their successors.

Albert G. Waterman, original trustee under the mortgage which the Butler County decree purports to vacate, died in 1862. (Trans., p. 41.)

John Moore, original trustee under said mortgage, died September 23, 1866. (Trans., p. 42.)

Butler County's suit was begun November 7, 1866 (Trans., pp. 15–122). The decree rendered recites the appearance of these dead men "in person and by attorney." Such recital was false in fact and does not estop a party affected from showing the deaths of these parties. A record is a record made up in the usual course of judicial proceedings, of which parties to be affected shall have been notified in the manner required by law. Dead men cannot be sued, and the living are not affected by judgments against them.

3. Upon the dissolution of the railroad company its property passed to its directors.

Assuming the dissolution of the extinguishment of the corporation to have been the legal effect of the sale of October 1, 1866, immediately thereupon the legal title to all of its property passed to its directors "as trustees for its creditors and stockholders, with power to sue for and recover its debts and property by the name of the trustees of such corporation, describing it by its corporate name, *and may be sued by the same.*"

This is the plain and literal provision of the law under which the corporation was created, and by which it was governed in 1866. The articles of association of the Cairo & Fulton Railroad Company recite that "In conformity with the act of the General Assembly of the State of Missouri entitled 'An act to authorize the formation of railroad associations and regulate the same,' approved the 24th day February, 1853, the undersigned have associated themselves,

etc., under the name of the Cairo & Fulton Railroad Company, etc."

The 11th and 12th sections are as follows:

"Sec. 11. Upon the dissolution of any corporation created under this act, unless other persons shall be appointed by the Legislature or by some court of competent authority, the directors or managers of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of the dissolved corporation, and shall have full power to settle its affairs, collect and pay all outstanding debts and divide among the stockholders all the money and other property that shall remain after the payment of debts and necessary expenses.

"Sec. 12. The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, describing it by its corporate name, and shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands." (Trans., p. 27.)

This act as amended (and such amendments were expressly allowed by the law) by the General Statutes of Missouri, 1865, is even more explicit with respect to the duties and powers of trustees. Section 19, page 329, provides that—

"Upon the dissolution of any corporation already created or which hereafter may be created, by the laws of this State, the president and directors or managers of the affairs of said corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of such corporation, with power to sue for and recover its debts and property by the name of the trustees of such corporation, describing it by its corporate name, and may be sued by the same." (Gen. Stats. Mo., 1865, p. 329, Sec. 19.)

It seems, therefore, that according to the law which created and controlled the corporation, all of its property passed

to its then directors immediately upon its dissolution, and said directors were declared to be trustees for the management of its property, with power *to sue and be sued as such trustees.* That under such circumstances jurisdiction could not be acquired with respect to the property of the company, without joining its directors and notifying them of the suit, is too obvious to require argument. The trustees, being clothed with the legal title to the property to be affected, were indispensably necessary parties to any litigation affecting that property. This doctrine has recently been declared in Missouri, in the case of Ford *vs.* Railroad Company, 52 Mo. App., 453, wherein the court says:

"If the corporation has ceased to exist, if its powers are extinct and its managing officers have become *functus officio*, if such officers have been converted into statutory trustees and in that capacity will represent the corporation, it is quite difficult to understand how in this action against the corporation the service of summons on any one of them as president would confer jurisdiction over the dead corporation."

The same principle is discussed in the case of People *vs.* O'Brien, 111 N. Y., 1, wherein the court says:

"As we have seen, the property of this corporation vested in the persons who were its directors at the time of its dissolution. They took it as trustees for the stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the Constitution in relation to the taking of property without due process of law. * * * We therefore think that this law is obnoxious to the objection that it assumes to take property without due process of law, and impairs the obligation of a contract."

The same principle is declared and fully discussed in the case of Pendleton *vs.* Russell, 144 U. S., 640.

For the foregoing reasons we shall assume that after the dissolution of the Cairo & Fulton Railroad Company, its property and all rights and responsibilities with respect to such property, including the capacity of being sued, devolved upon its directors, and that the judgment against the defunct corporation does not estop us from showing the fact.

4. Mason Brayman was duly appointed trustee, as successor to A. G. Waterman, trustee, deceased, on the 22d day of March, 1866, seven months before the Butler County decree was rendered.

The deed of trust dated May 23, 1857, conveyed the legal title to the lands, for the purposes of the mortgage to John Moore, John Wilson, and Albert G. Waterman, trustees, and "unto the survivor and survivors, successor and successors of them forever" (Trans., pp. 34 and 35). The eighth clause of the instrument which is fully set forth in the transcript (page 35), provided:

"That all vacancies that may occur in the office of trustees *by death*, resignation, or otherwise, shall be filled thus: The first vacancy shall be filled by a majority of the members of the *board of trustees* as constituted, being in office at the time such vacancy shall take place. The next vacancy shall be filled by the parties of the first part (railroad company), and so on alternately until the end. They (the original trustees) shall constitute and appoint of their own number, *or otherwise*, a president of their *board of trustees, who shall be a member thereof.*"

It appears by the record (Trans., p. 43), that on the 7th day of May, 1858, the board of trustees was organized by the election of Mason Brayman, of Illinois, to be president

of the board of trustees, and a member thereof, in accordance with the provision quoted.

A. G. Waterman, original trustee, died in the year 1862 (Trans., pp. 41 and 42), and on the 22d day of March, 1866, Mason Brayman was appointed and constituted trustee in lieu of Waterman, deceased, by the following deed of appointment:

"Under authority of power vested in us by a certain deed of trust executed by the Cairo & Fulton R. R. Co., of Missouri, dated May 23, 1857, we, as surviving and remaining trustees, do hereby appoint and constitute Mason Brayman, of Illinois, trustee to fill the vacancy caused by the death of Albert G. Waterman, an original trustee named in said deed.

"JOHN WILSON,
"*Trustee,*
"MASON BRAYMAN,
"*Trustee and President.*

[SEAL.] (Bd. of Tr, C. & F. R. R. Co.)."
(Trans., p. 43.)

It will be observed that this deed of appointment constituting Brayman trustee, in lieu of Waterman, is signed by Brayman "as trustee and president;" in other words, that Brayman, "trustee," joined in the appointment of Brayman to be trustee in lieu of Waterman. This peculiarity of the instrument and of the act is explained by the provision of the deed of trust already set out. It is therein provided that the three original trustees shall appoint one of their own number, *or otherwise*, to be president of the board of trustees, and that the president so appointed shall be a *member of the board.* Upon a majority of the *board* of trustees, so constituted, the power to fill vacancies in the office of *title* trustee, caused by death or otherwise, was conferred. At the time of the appointment of Brayman in lieu of Waterman, the *board* consisted of Wilson, Moore and Brayman. Wilson and

Brayman, therefore, constituted at that time a majority of the *board* and were empowered to act. Moore died shortly afterward in Boston, Mass., and was in all probability incapacitated at the date of the deed of appointment. The appointment of Brayman was therefore made in strict compliance with the provisions of the deed of trust.

We have ventured upon this explanation because the Supreme Court of Missouri seems to have misunderstood the distinction between the original trustees and the board of trustees; to have attached a wrong significance to the facts and assumed them to indicate the appointment of Brayman "to an office which he already held." Such an assumption is unwarranted. Brayman was never a title trustee until his appointment in March, 1866, to fill the office vacated by the death of Waterman. He was president and a member of the board of trustees and joined in his own appointment to the office of title trustee. The deed of trust conferred upon a majority of the board the power to fill vacancies, and Brayman and Wilson constituted such majority on the 22d day of March, 1866.

The propriety of conferring upon the *board* of trustees, as distinguished from the title trustees, the power of filling vacancies is obvious, if it be remembered that a vacancy in a board of three cannot well be filled by a majority of the survivors. Where two survivors differ, a majority is impossible, and the due administration of the trust might be obstructed. For the foregoing obvious reasons, the power to fill vacancies was not, by the deed of trust under consideration, given to a majority of the surviving trustees named in the mortgage, but to a majority of a board duly constituted, composed of four members, so that upon the happening of a vacancy a majority of three might act.

With respect to the propriety of the appointment of Brayman under the circumstances, little doubt can arise. He was already a member of the board of trustees and familiar

with the duties and responsibilities of the trust. He had no interest adversary to those which he was appointed to represent. No principle or policy of law was violated. Assuming him to have been a fit person, which was undoubtedly the opinion of the only other member of the board competent at that time to act, his joinder in the deed of appointment was necessary in order that the terms of the mortgage might be complied with. The appointee of a power may exercise it in his own behalf whenever such a course is permitted by the instrument which confers it; and he should exercise it in his own behalf where, as here appears, he acquires no personal interest thereby and is best qualified to administer the trust to be imposed.

Moreover, it appears from the record that the substitution of Brayman in lieu of Waterman was known to and acquiesced in by the directors of the railroad company, and that no objection has ever been raised by any of its creditors or stockholders. The subsequent order appointing Bedford in lieu of Moore, made by the directors of the company, is in the following words:

BLOOMFIELD, Mo., *April 11, 1867.*

Ordered by the board of directors that whereas notification has been received from the board of land trustees of the Cairo & Fulton R. R. Co., in Missouri that the vacancy existing in said board of trustees occasioned by the death of Albert G. Waterman, an original trustee, has been filled by the appointment of Mason Brayman in the manner provided in the deed of trust, and furthermore that another vacancy exists because of the decease of John Moore, as original trustee, which vacancy is to be filled by this board, as provided in said deed of trust, it is therefore ordered that Henry H. Bedford is hereby appointed land trustee of the Cairo & Fulton R. R. Co., of Missouri to fill the vacancy occasioned by the death of John Moore, an original trustee.

(Signed) GREEN L. POPLIN,
President of the C. & F. R. R. of Mo.

(Trans., p. 79.)

That the legal title to the lands became vested in Brayman jointly with Moore and Wilson in virtue of his appointment is clear from the provisions of the deed of trust quoted. The habendum clause was to the trustees named and the "survivor or survivors, successor or successors," of them, for the purposes of the mortgage. A formal instrument of conveyance was unnecessary at that day, whatever may have been the ancient practice. (National Bank *vs.* Eldridge, 115 Mass., 424; 2 Lewin on Trusts, 8th Edition, star p. 850, and note.)

Brayman accepted the trust. This fact is established by his signature of the deed of appointment, and by subsequent deeds which he signed jointly with Wilson and Bedford (to be presently referred to), conveying, pursuant to the provisions of the mortgage, particular parcels of the lands involved. (Trans., p. 69.)

5. Neither the directors of the railroad company, nor Brayman, nor Bedford, were made parties to or notified of the Butler County suit. The decree rendered in said suit which purports to vacate and annul the patent to the company and the deed of trust made to secure its bonds, therefore deprives parties in interest of property without due process of law.

If we be right in assuming, for the reasons hereinbefore declared, that the Cairo & Fulton Railroad Company was dissolved by the sale under the "sell-out act," October 1, 1866; that Waterman, trustee, died in 1862, and Mason Brayman was duly appointed and constituted trustee in his stead March 22, 1866; that John Moore, trustee, died September 23, 1866, and Henry Bedford was duly constituted trustee in his lieu and stead; then, on the 7th day of November, 1866, the date of the commencement of the suit of Butler County *vs.* said railroad company, John Moore, Albert

G. Waterman and John Wilson, and certainly on the 2d day of July, 1869, the date of the rendition of the decree, the legal title to the lands involved was vested in the directors of the railroad company, and in John Wilson, surviving, and Mason Brayman and Henry Bedford, the substituted trustees. None of these persons were made parties to or notified of the suit, except John Wilson, who was served by publication only. The decree complained of was rendered under the circumstances described. It purports to vacate and annul the patent whereby the railroad company acquired title to the lands, and the mortgage made by it to secure its bonds, and to restore the lands to the county.

The only question in this case is, whether such a decree, so rendered, deprives the directors of said company and the substituted trustees, under whom plaintiffs in error claim title, of property without due process of law.

It is hardly necessary to discuss this branch of the case. Where the title to property is vested in A, B and C, directors of a dissolved corporation, and in M and W, trustees for its bondholders, a suit begun and prosecuted against the dissolved company and W only cannot result in a decree which binds those who were not notified.

The General Statutes of Missouri, 1865, provided that upon the dissolution of a corporation its property should pass to its directors for the purposes of liquidation, and conferred upon them power "to be sued as trustees of such corporation," with respect to said property. (P. 329, Sec. 9.) The Revised Statutes also provided that parties united in interest "must be joined as plaintiffs or defendants." (Stats. 1889, Sec. 1994.)

Independently of these express legislative requirements, it is quite obvious that the directors of the corporation and the substituted trustee, were indispensably necessary parties to any suit affecting the property vested in them.

The legal title to such property vested in them could not be divested without affording to them an opportunity to be heard. This is fundamental law founded upon obvious considerations.

"It is an elementary principle that a court cannot adjudicate directly upon a person's rights without having him directly or constructively before it."

Gregory *vs.* Stetson, 133 U. S., 586.

"There is a class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of other parties that their legal presence as parties to the proceeding is an an absolute necessity, without which the court cannot proceed."

Barney *vs.* Balto., 6 Wall., 284.

"We do not put the case upon the ground of jurisdiction but upon the broader ground which must equally apply to all courts of equity. No court can adjudicate directly upon a person's rights without the party being before the court."

Shields *vs.* Barrows, 17 How., 141.

That the directors of the railroad were indispensably necessary parties we have already established by the authorities cited.

Ford *vs.* R. R. Co., 52 Mo., App., 439.
People *vs.* O'Brien, 111 N. Y., 1.

That Brayman, the substituted trustee, was an indispensable party is equally obvious. He held the legal title jointly with Wilson, for the purposes of the trust, when the suit was brought. It is an ancient principle that "a trustee cannot be sued without his companion."

Viner's Abr. B., 69 "Party;"
Calvert on Parties, 207-216;
Hallett *vs.* Hallett, 2 Paige, 14;
Mallow *vs.* Hinde, 12 Wheat., 149.

If, at any time during the progress of a suit, it be suggested to the court that by reason of the absence or lack of indispensable parties, it is disqualified from proceeding to judgment, the court will arrest the progress of the suit in order that these parties may be brought in; and, if for any reason, they cannot be brought in, the proceeding will be dismissed.

If, notwithstanding the absence or lack of such parties, the court proceed to judgment, the judgment will be void and ineffectual with respect to such parties. It is void as to them because they have had no opportunity to be heard. One of the functions of a writ of error *coram nobis* is to enable a court to purge its record of such invalid decrees, so that they may not be used to the prejudice of those whose rights they wrongfully purport to affect. If a court refuses to cavate its decree upon such a suggestion, it denies a right and immunity secured by the provision of the Constitution of the United States, which declares that no person shall be deprived of property without due process of law.

"Due process of law means a course of legal proceedings according to the rules and principles which have been established for the protection and enforcement of private rights."

Pennoyer *vs.* Neff, 95 U. S., 733.

"No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

Scott *vs.* McNeal, 154 U. S., 46.

We complained of the decree under consideration that it was void with respect to the parties sued, because when this suit was brought one of them was a dissolved corporation, and the two others were dead; that it was rendered without notice to the directors of said company of Mason Brayman

and Henry Bedford, the substituted trustees, each of whom had a legal representative right and responsibility with respect to the lands to be affected, and was, therefore, an indispensably necessary party to any proceeding having for its object the extinguishment of the title which they held.

The decision of the Circuit Court sustained the contention of plaintiffs. The Supreme Court decided against the right and immunity contended for. The effect of, its decision is to transfer, by means of the decree complained of, the property of plaintiffs to the defendants. In every subsequent controversy between the parties, said decree will be accepted as valid and binding. To redress and prevent this wrong we have appealed to this Court, relying upon Federal authority to protect rights secured by the Federal law.

The statement and reiteration of this point may seem unnecessary, yet as the Supreme Court of Missouri has disallowed it, we have ventured, even at the risk of seeming impertinence, to declare our position with painful precision. Some explanation of the Supreme Court's position ought perhaps to be made.

With respect to the dissolution of the railroad company it intimates a doubt, notwithstanding the cases of Moore *vs.* Whitcomb and Chouteau *vs.* Allen (Trans., p. 132), but it does not overrule those cases. The court says :

"If the corporation was dissolved, the failure to proceed against the president and directors, as trustees, was simply an irregularity that might have been amended if seasonably prayed, but is no ground for now vacating the judgment." (Trans., p. 132.)

Inasmuch as we have already fully discussed the facts showing the dissolution of the company, further discussion is unnecessary. The conclusion of the court that a judgment against a dissolved company is merely irregular is

founded upon a radical misconception of the law; for if the company be dissolved its former property no longer belongs to it, but to the trustees appointed by law to take charge of it for the purposes of liquidation. The same law expressly provided that suits affecting such property should, after dissolution, be brought against the directors of such company describing it by its corporate name.

That a decree against the dissolved company which purports to divest property rights which had passed from it and devolved upon trustees appointed by law is not merely "irregular" is too obvious to require discussion.

With respect to the failure of the county to make Mason Brayman a party, the Supreme Court suggests that his appointment was irregular because the deed of appointment was not recorded.

The authorities cited show that no conveyance of lands is necessary to vest the legal title in a substituted trustee, unless the deed of trust requires such conveyance.

"It would appear that at the present day an actual conveyance of the legal estate, unless the power is specially worded, is not essential to the valid appointment of new trustees."

II Lewin on Trusts, 8th ed., star page 850 and note.

All parties who have notice of the deed of trust have notice also of the mode in which vacancies must be filled. The deed of trust did not require the appointment to be recorded. The law made no such requirement. The burden of ascertaining in whom the title was vested at the time the suit of Butler County was instituted, rested upon the plaintiff. The information could easily have been procured. The mode of ascertaining it was pointed out by the deed of trust. That deed was itself set out in the petition of Butler County, and the court was asked to vacate it. No effort seems to have been made to get the names of the real par-

ties in interest. Emerson testifies that he knew nothing about the company, and assumed that he was not bound to know anything. We submit that where the legal title to property is vested in the trustees for the benefit of bondholders by an instrument which especially provides how vacancies shall be filled, a party who seeks to divest said title and destroy the value of the bonds secured, is bound to inquire who, at the time he files suit, is charged with the legal responsibility of representing the estate which he seeks to divest. In an ordinary case no doubt could arise upon such a proposition. While it is true that trustees under a mortgage are empowered to represent the unknown body of its bondholders, yet it is equally indisputable that all of the trustees must be brought into court. The trust is to all. The bondholder is entitled to the diligence and fidelity of all. To secure the co-operation of several is the sole purpose of conveying to more than one.

But, the court suggests, Waterman and Moore died abroad and their successors were appointed out of the State, and a party suing is not bound to take notice of the substitutions.

Surely such a position is untenable. If a non-resident owning property in this State die, leaving a will conveying such property to foreign trustees, is not one who sues here for the recovery of the property bound to take notice of the death? Would a judgment in this State, in a suit brought against the dead man, be effectual? The difficulty of ascertaining the fact does not excuse a litigant where the law is peremptory. In the present case there could have been no difficulty, if proper, ordinary diligence had been used. The deed of trust, as we have seen, gave notice of the consequence of death and pointed out how the vacancies should be filled in the office of trustee.

Six months before the suit of Butler County was insti-

tuted, Mason Brayman had been appointed trustee to succeed Waterman, in the mode provided by the deed of trust, and two years before the decree under consideration was rendered Bedford had been appointed successor to Moore, deceased, and the records of the board of trustees show these facts. The records of the company also show them. The law under which the corporation was organized required that the directors should make public reports of their affairs and file the same with the Secretary of State each year. The slightest effort might have enabled the attorney for the plaintiff to ascertain the facts. Emerson, who represented the county, did not prior to the suit know the facts, because he took no trouble to ascertain them. This is his own statement. *Yet he was warned by Bedford at the hearing in time to correct his error.* No mistake can arise on this point. Bedford's testimony is confirmed by Crum, an impartial bystander, who testifies that he heard the protest and the explanation. (Trans., pp. 71–83.)

We venture in this connection to call the attention of the Court to a case recently decided by it which illustrates the duty imposed upon one who institutes legal proceedings to ascertain and notify the parties to be affected, however difficult that may be. In the case of Scott *vs.* McNeal (154 U. S., 34) it was decided that a sale made by one assuming to act as administrator of another, who was in fact alive, was absolutely void, notwithstanding that the latter had been absent for ten years, and a local statute provided that seven years' absence under like circumstances should authorize the judge of probate to treat the case as though the party were dead. (Pp. 41–47.)

The facts now presented for consideration are as follows:

Long prior to 1866, one of the trustees under the railroad mortgage died; in March, 1866, a successor was duly appointed, who accepted the office, and in fact served as his

successor in trust. In September, 1866, another trustee died, and in April, 1867, Bedford was duly appointed trustee to succeed him. In November, 1866, after the death of the two trustees, and eight months after the appointment of a successor to one of them, a suit was brought against the two dead men and the survivor. The substituted trustee was not joined at any stage of the proceedings, nor notified of it. More than two years after the appointment of successors to both trustees, and after counsel for plaintiff had been notified of the death of defendants and the defect of parties, a decree was rendered annulling the title of all the trustees and annihilating the security of the bondholders whom they represented. The Supreme Court of Missouri ratifies and establishes such a decree, and holds it to be good and operative notwithstanding the remarkable circumstances under which it was rendered.

In justification of its course, the Supreme Court refers to the fact that pleadings appear to have been filed on behalf of defendants; yet we show that of the defendants two were dead and could not possibly have appeared by attorney for any purpose before any earthly tribunal. The Supreme Court suggests that information with respect to the real parties in interest was difficult to obtain. We invoke a fundamental rule of law, that no matter how difficult, the information must be obtained, and show by the record that the information *was in fact obtained* in time to repair the errors committed.

The Supreme Court mentions the right of survivorship; we concede it, but avoid by citing the provisions of the deed of trust and showing that pursuant to such provisions a successor was appointed and the estate passed long prior to the commencement of the suit to him. A supposed irregularity in the appointment of such successor is pointed out. We show that there was no such irregularity; that the trustee

appointed accepted the trust and acted as trustee, and establish by authorities which the court has not discussed nor impeached, that the legal title was in such successor.

The Supreme Court seems to assume that we have some sentimental regard for dead men, and on that ground think a judgment against them ought to be avoided; but that is not our position. We object to the decree because dead men cannot in the nature of things represent live interests.

The Supreme Court imputes bad faith, laches and negligence to Bedford, one of the trustees, and on that ground would deprive us of the benefit and legal right of representation by another trustee, who admittedly was not made a party and was never notified. But to this we reply that the negligence of one of the trustees all the more clearly shows the need of two trustees.

From whatever point of view the case may be considered but one conclusion can be arrived at. The salient, insurmountable facts to be considered allow of but one. The Cairo and Fulton Railroad Company was dissolved October 1, 1866, and it has been so held by the Supreme Court of Missouri twice. Thereupon its property devolved upon its directors as trustees "with power to sue for and recover the same by the name of the trustees of the Cairo and Fulton Railroad Company, and be sued by the same name." This is the plain provision of the statute which created and controlled the company.

On the same day, October 1, 1866, the legal title to the lands herein involved was, for the purposes of the mortgage, vested in John Wilson and Mason Brayman, trustees for bondholders.

The suit of Butler County was instituted November 7, 1866, for the purpose of vacating and annulling the patent conveying the lands to the railroad company, and said company's mortgage conveying them to trustees for the benefit

of bondholders. The defendants to the action were the railroad company, then dissolved, A. G. Waterman and John Moore, then dead; and John Wilson, a resident of Illinois. Neither the directors of the railroad company, to whom the property had already passed, nor Mason Brayman, successor to A. G. Waterman, were joined or notified. Of all the persons charged with the duty of representing and defending the interests to be affected, but one was joined, and he was notified by publication only. The pleadings purporting to have been filed were unauthorized. The hearing was *ex-parte*. The decree drafted by the attorney for the plaintiff is surcharged with false recitals and was adopted by a judge without alteration and without inquiry, notwithstanding a public protest and proclamation of the real situation of the parties. That such a decree rendered under such circumstances, is violative of the Constitution of the United States cannot be denied.

IV.

No Independent ground to justify decision of Supreme Court of Missouri.

But one question remains to be disposed of. Is there any ground, independent of the Federal question, which justifies the decision of the local court?

Among other reasons given by the Supreme Court of Missouri for its refusal to vacate the decree of the Butler County circuit court, it is affirmed that we have been guilty of laches in not moving at an earlier day, and therefore should be denied relief.

That the doctrine of laches cannot be applied is abundantly evident if the situation and circumstances of parties since the date of the decree aforesaid be borne in mind.

Prior to the rendition of the decree complained of the lands involved were constructively in the possession of trustees named in the deed of trust dated May 27, 1857, or their successors. Although the record does not very clearly establish this fact, yet it sufficiently appears from the conveyances made from time to time by such trustees of particular tracts of said lands. On page 69 of the transcript (near the bottom) it appears that Bedford, trustee, identified an instrument signed by himself, Mason Brayman and John Wilson, "trustees," as a "deed made in the usual form that was made by the original trustees of the Cairo and Fulton railroad." It seems, therefore, that under the provisions of the deed of trust which are not fully set out in the record, the trustees had the power to convey tracts of land divested of the lien of the mortgage and that they were in the habit of exercising this power.

Morever, the object of the suit of Butler County seems to have been to cancel the county's subscription to the stock of the railroad company, and to annul the deed made on its behalf to satisfy such subscription; yet the record shows that *after* the decree was rendered the county *retained* the stock; for in June, 1870, the county court adopted an order revoking the power under which John W. Emerson had represented the county interest in the railroad, and requiring him to forthwith file the county's certificate with the clerk of court. (Trans., p. 82.) Notwithstanding the decree, no effort was at any time made, either by the county or Emerson, its attorney, who received nearly twenty-eight thousand (28,000) acres of land for procuring the decree, to recover the lands. (Trans., pp. 84–96.) Emerson thought his title of so little value that he immediately gave the lands to certain relatives, "because at the time wild lands were unsalable and I did not regard them as amounting to very much in value, and I said to him: 'If

you will proceed now to make sales and take charge of the business you may have all of these lands.'" (Trans., p. 96.)

Not an acre of the lands here involved, amounting to 44,000 acres, was at any time appropriated, or occupied or sued for by any person whomsoever, except Thomas Allen, who claimed that he purchased the title of the county and set up such title in the foreclosure suit brought by Chas. P. Chouteau. (Trans., p. 35.) But the Supreme Court decided in that case that the title so acquired was subordinate to the lien of the mortgage and foreclosed the title which he claimed, notwithstanding the decree which purported to cancel the mortgage.

Chouteau *vs.* Allen, 70 Mo., 327.

After said decree of foreclosure was rendered the county acquiesced in the decision of the Supreme Court and *assessed the land for taxation in the name of the purchaser at the foreclosure* sale until the year 1886, the date of purchase by the plaintiffs in error. After that time the lands were assessed in the name of the plaintiffs in error. (Trans., p. 54.)

The other defendant herein, the railroad company, claims under the patent dated February 17, 1870, which purports to convey the lands to the county of Butler, under the act of March 10, 1869; a contract thereafter made by the county with it, and a deed made pursuant to said contract. (Trans. p. 117.) An examination of the act of March 10, 1869, shows that the act in *express terms prohibits* the conveying to the county of *any lands theretofore subscribed by the county to the Cairo & Fulton R. R. Co.* (Trans., p. 117.) Moreover the contract with the county relied upon, made after the decree of the circuit court of Butler County, is signed by Thomas Allen as president of the railroad corporation, and at that very time Thomas Allen was party defendant to the foreclosure proceeding, asserting title in himself to the lands which the railroad company now claims.

The claims of Allen, like the claims of the railroad company, were predicated upon the decree of the Butler County circuit court. Irrespective of said decree there could have been no doubt that the title passed under the patent of the State to the Cairo & Fulton R. R. Co., and under its mortgage to trustees for the benefit of its bondholders. Allen's title, as we have seen, was declared by the Supreme Court of Missouri in the case of Chouteau *vs.* Allen (70 Mo., 327), to be subordinate to that of the railroad company and said trustees. This opinion was uttered in the year 1882, and thereafter until the institution of the ejectment suit by the St. Louis, Iron Mountain and Southern R. R. Co. against the plaintiffs in error, in 1888, no claim of title seems to have been asserted by said company.

In that year for the first time, so far as this record shows and irrespective of the record we believe this to be the fact, the Iron Mountain Railroad Company instituted a proceeding for the recovery of the lands. Such proceeding was dismissed by said company, but the effect of the assertion of their claim was such that sales by plaintiffs in error became impossible. In order to avoid damage and loss on this account, in the year 1889, immediately after the dismissal of said suit, the plaintiffs in error began this proceeding against said railroad company and Butler county, to quiet their title with respect to the claims urged against it.

We submit that under the foregoing condition of facts there is no room for the application of the doctrine of laches. The plaintiffs in error have been in possession of the lands certainly since the year 1882, the date of the decree of the foreclosure rendered by the Supreme Court of the State of Missouri. During that time and for years prior thereto, they, or their grantor, paid taxes to the county which were assessed against them by the county on account of said lands. As soon as it became apparent that their rights

were disputed by the railroad company and the county, a proceeding was instituted for the purpose of determining such rights. We have never heard of any principle of law, nor been cited to any authority, declaring that a party in possession of land is bound to proceed within any period whatsoever to establish his claim of title. Statutes of limitation are directed against parties out of possession, and are designed for the quiet and peace of society, and to enforce diligence in the assertion of claims adversary to those of the party in possession. This principle is well illustrated in the case of Baker *vs.* Kelly (11 Minn., 480–495), in which it was declared that a statute requiring one in possession to bring a proceeding within a defined term against the purchaser of a tax title, or forfeit his estate, was contrary to fundamental principles of common justice, as well as the law of the land. The application of the principle which we invoke is illustrated in the case of Sharon *vs.* Tucker, decided by this Court in 144 U. S., 533, wherein it was decided that a party who had had possession of lands for the period prescribed by the statute of limitations, might, upon the expiration of such period, bring a proceeding against the record owner of the lands to divest his title and have such title by the record vested in the possessor. If, as the Supreme Court of Missouri seems to have held in the present case, a party in possession of lands is precluded from having any relief from a court of equity, because he waits twenty years before instituting a proceeding for that pupose, the case of Sharon *vs.* Tucker is wrongfully decided and ought to have been for the record owner.

In other words, if the mere lapse of time precludes one in possession of lands from resorting to a court of equity for relief from a cloud cast upon his title by adversary claims, the purpose of the statute of limitations, and the sound considerations of public policy upon which it rests, are

perverted from their usual and just function and made to subvert rather than establish the rights which it was designed to protect.

In the present case it does not appear by the record that plaintiffs have had possession for the period prescribed by the statute of limitations and therefore the Sharon case is not invoked as a controlling authority. We invoke the principle upon which it is founded, to wit, that public policy demands that a person who is in possession of lands and has a valid claim thereto shall be protected by law and enabled to clear his title of clouds and suspicions cast upon it, however they may have originated, provided they may be unjust and without valid foundation.

The present case is stronger than the Sharon case in this: The latter involved the transfer of an originally righteous title from the record owner to the party claiming under the statute; the former involved the extinguishment of a claim which was never righteous and ought never to have existed.

We insist that the decree of the Butler County circuit court has always been void; that it never had validlty for the reasons set forth. "That which was void in the beginning cannot become valid in the course of time," was a maxim of civil law.

(Dig. L. 50, Tit. 17, 24.)

It is the common law of this land also. The Supreme Court of Missouri has recognized it and given effect to it in at least two cases. In the case of Powell *vs.* Gott (13 Mo., 438) and Latshaw *vs.* McNees (50 Mo., 381), it was held that a writ of error *coram nobis* is not barred by any statute of limitation. The same rule was declared by Mr. Chief Justice Marshall in the case of Strode *vs.* the Justices (1 Brock., 162).

The present case is in the nature of a writ of error *coram*

nobis. The petition was filed in the circuit court of Butler County, and asked that court to vacate its former decree rendered between the same parties, or their privies, on the ground that when said decree was rendered the defendant corporation had been dissolved, two of the defendants had died, and indispensably necessary parties had not been joined. We suggested to the court, after notice to all parties to be affected, that its former decree was improvidently rendered by reason of matters of fact not appearing of record, and on that account asked that it be vacated. This was the paramount and primary object of the present suit. We also asked that the pretensions of defendants, founded on said decree, be declared groundless, not because such a result would not have followed the vacation of the decree, but because we desired the affirmative judgment of the court to that effect, so that complete justice may be done and all controversies set at rest.

We submit, therefore, that the doctrine of laches cannot be applied except as a cloak for the refusal to vacate the decree. We are, and have been for many years, in the possession of the lands. The decree complained of was when rendered, and ever since has been, void and ineffectual. The refusal to vacate it on whatever ground is to validate and establish it and make that which was void in the beginning valid in the end. The effect of such a refusal is now to deprive us of property without process of law, because we never had and are now refused a hearing upon the merits of the case presented for adjudication. The question of laches is indissolubly bound up with the questions arising on the decree. If it was void, it is void, and ought not to be validated as against a party in possession, claiming under those against whom the decree was originally rendered without process of law.

The Supreme Court of Missouri seems to have perceived

this difficulty in its position. It therefore declared that the Butler County decree was "irregular" merely, and that "such irregularity might have been cured if seasonably prayed." If the decree was irregular, we are out of court. We insist, however, that it was and is null and void, and have brought the case here solely for the purpose of having its character determined.

Irrespective of the considerations urged, we insist that plaintiffs in error have not been guilty of laches. The Butler County decree was rendered July 2, 1869. The foreclosure suit, brought by the bondholder Charles P. Chouteau, the plaintiffs' grantor, was instituted December 21, 1871 (Trans., p. 35), and Thomas Allen was made the party defendant therein because he claimed under Butler County. Allen filed an answer in the foreclosure suit in which he alleges that "*by virtue of a conveyance made by Butler County before the commencement of this action he became and is the owner in fee simple of lands described in the petition.*" (Trans., p. 37.) Allen's claims were considered by the Supreme Court and held by it to be subordinate to the mortgage. Chouteau *vs.* Allen (70 Mo., 327). The foreclosure suit was pending from December, 1871, until June, 1882 (Trans., pp. 35–39). Immediately after the decree of foreclosure the County of Butler *acquiesced in the decree and began to assess the lands for taxation in the name of the purchaser at the foreclosure sale, and has ever since continued to do so*, and said taxes have been paid by Chas. P. Chouteau and his grantees (Trans., pp. 54–46). It appears, therefore, that as soon as he obtained the legal title to the land by the decree of foreclosure, the purchaser took possession of them by consent of the county, paid taxes thereon and dealt with them as his own. Until the year 1888 no claim of adversary interest was asserted by the county or its grantee, and in 1889, immediately upon the dismissal of the ejectment suit brought by

the St. Louis, Iron Mountain and Southern R. R. Co., this suit was instituted. The railroad company admitted plaintiffs' possession in this suit.

Under the foregoing circumstances there cannot be the slightest room for the suggestion of laches, even assuming that the Butler County decree was "irregular," merely. We insist that said decree was void; but from any aspect of the case it abundantly appears that the plaintiffs have used such diligence as their situation required.

The Supreme Court also affirm that we ought to be denied relief because we were not a party to the suit when the decree was rendered. It says:

"This attack is made by one who was and is a stranger to that suit, twenty years after its rendition. None but the parties to a suit will be allowed to interfere with its management, and none but parties who are liable to be injured by it can complain of the irregularity by which it may be infected. But if it be said that as a purchaser from one who purchased the lands under the judgment in Chouteau *vs.* Allen, plaintiffs have a right to attack this judgment, the answer is that the sale under the decree in Chouteau *vs.* Allen was made by a special commissioner, John H. Fisse, appointed by the court, and not through Brayman and Bedford, or either of them; and any title Chouteau obtained did not rest upon a recognition of Brayman and Bedford, as trustees by this court. Neither the railroad company, nor Wilson, Brayman or Bedford, have in all these years sought to avoid that judgment, and a stranger ought not and will not be allowed to complain that all necessary parties were not before the court." (Trans., p. 130.)

This remarkable language of the court shows an entire misconception of the facts disclosed by the record. When the suit of Butler County was instituted, as the record shows, the title to the lands involved in the controversy was in the directors of the Cairo and Fulton R. R. Co., and in John Wilson and Mason Brayman, trustees for its bondholders.

We insist that the decree, which purports to cancel the deed to the corporation and the mortgage made by it, was and is void because neither the directors of said company nor Mason Brayman were made parties to or notified of the suit in the course of which said decree was rendered; and that the interests, the property rights represented by these parties, were unaffected by the decree; that these interests and rights passed by the decree of foreclosure rendered by the Supreme Court of Missouri to the plaintiffs in error through the medium of the commissioner's sale and Chouteau's deed.

The directors of the Cairo and Fulton R. R. Co. and Mason Brayman and Henry Bedford and John Wilson, trustees, were made parties defendant in the foreclosure suit and duly served with process. (Trans., pp. 16, 71 and 76.)

Charles P. Chouteau, "*the owner of the greater part of the bonds of the Cairo and Fulton R. R. Co.,*" *was plaintiff in said suit.* (Trans., p. 16.) Thomas Allen, *who claimed to be the grantee of the county of Butler and who was then president of the Iron Mountain R. R. Co., the defendant herein, was also made a party defendant,* and urged in his answer and at the hearing, his claim so derived. (Trans., pp. 35-88.)

It appears by the record, therefore, that the present plaintiffs in error are in privity with, and derive title under, the holder of the bonds of the Cairo and Fulton R. R. Co.; the trustees under the mortgage whereby said bonds were secured; the directors of said railroad company, who, upon its dissolution, became by the terms of the statute creating it trustees of all its property "*with power to be sued as such*;" Thomas Allen, who claimed under the County of Butler; and various other parties having claim to or interests in the land. Yet the Supreme Court of Missouri declares that we are *strangers* to the parties affected by the Butler County decree, and therefore should be debarred from

relief; and this view is adhered to notwithstanding that in our motion for review we fully set forth the facts above recited!

Upon a review of all the facts in the case it is obvious that the laches of the plaintiffs is not an independent ground sufficiently broad to justify the opinion of the Supreme Court of Missouri. The plaintiffs have not, in fact, been guilty of laches. There is not in all the record the slightest foundation for such a charge. The doctrine of laches was applied by the Supreme Court of Missouri upon an absolute, comprehensive, missapprehension of the character of the Butler County decree; of the relationship of the plaintiffs in error to those immediately affected by it; of the effects and consequences of possession; and of the mutual rights and obligations arising from the legal and actual relationship of the parties. Its judgment rests upon one ground only. All else urged by the court is predicated upon its conception of the character of the Butler County decree. It holds that decree, so far as we are concerned, to be valid and effectual to restore the lands to the county. It refuses to vacate it notwithstanding that it was rendered against a dissolved corporation and dead men; notwithstanding that rights were divested without notice and without a hearing; notwithstanding that the effect of its own judgment is to consummate the wrong originally contemplated; notwithstanding that we have never had, and are now refused, our day in court.

Rhadamanthus habet durissima regna.
Castigatque, auditque dolos.

This Court has repeatedly decided that it will examine the record to ascertain what was decided and what was decisive of the case. We submit that an examination of the record will show that but one question arises in the case

and that all others are without consequence. Was the decree of the circuit court of Butler County rendered without due process of law? We have endeavored to establish the fact that it was rendered without due process of law. The right to due process of law was specially set up and claimed in the petition herein filed. There is no other question in the case, except the charge of fraud, and upon that charge we are bound to submit to the judgment of the Supreme Court of Missouri.

ISAAC H. LIONBERGER,
Attorney for Plaintiffs in Error.

166-648

IN THE

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED
MAR 12 1897
JAMES H. McKENNEY,
CLERK

OCTOBER TERM, 1896.

ON WRIT OF ERROR TO THE SUPREME COURT OF MISSOURI.

F. G. OXLEY STAVE COMPANY,
Plaintiff in Error,
vs.
BUTLER COUNTY, *et al.*,
Defendant in Error.

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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

FRANK M. ESTES,
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For Defendant in Error.

W. J. KESL, 324 OLIVE ST.

IN THE

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ON WRIT OF ERROR TO THE SUPREME COURT OF MISSOURI.

F. G. OXLEY STAVE COMPANY,
Plaintiff in Error,
vs.
BUTLER COUNTY, *et al.*,
Defendant in Error.

STATEMENT:

Defendant in error's statement in brief is as follows:

The lands in controversy were granted to the State of Missouri by the United States by act of Congress of 1850 for the purpose of drainage. In 1853 they were granted by the State of Missouri to the County of Butler. By act of February 24, 1853, said county (with others) was authorized to subscribe to the capital stock of any railroad organized under said act and could pay such subscription in swamp lands. Under this act of February 24, 1853, the Cairo and Fulton Railroad Company was organized. By act of December 7, 1855, the County of Butler was authorized to subscribe to the capital stock of the Cairo and Fulton Railroad Company and pay said

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subscription in swamp lands. By act of December 10, 1855, any county could subscribe swamp lands to any railroad passing through said county. On the 24th day of October, 1854, the County Court of Butler County pretended to subscribe for $50,000 of the capital stock of said Cairo and Fulton Railroad Company and provided that same should be paid out of the swamp lands of said county. On December 6, 1855, the Butler County Court ordered that swamp lands be transferred to said railroad at $1.00 per acre in payment of said subscription, and on the same day said court again pretended to subscribe for an additional $50,000 of said stock, and ordered that alternate sections of swamp lands be transferred to said road at $1.00 per acre in payment of said subscription. On December 19, 1856, said County Court ordered its clerk to certify to the State register of lands that full payment had been made for said lands and on April 20, 1857, the State patented said lands to the Cairo and Fulton Railroad Company. On May 23, 1857, the Cairo and Fulton Railroad Company conveyed said lands to Moore, Wilson and Waterman to secure the payment of its bonds.

On the 7th day of November, *1866*, the County of Butler filed in the Circuit Court of that county its petition against the Cairo and Fulton Railroad Company and the said Moore, Wilson and Waterman, trustees, to cancel the patent from the State to the said railroad company and to set aside the deed of trust from the said railroad to the said trustees, for fraud. Service was had upon Green L. Poplin, the president of the Cairo and Fulton Railroad and upon the defendants, Moore, Wilson and Waterman by publication. Decree was entered in said case annulling the patent to said railroad company and cancelling the deed from the railroad company to Moore, Wilson and Waterman, trustees, and all right, title or interest acquired by them in and to said lands, and vesting said lands in

Butler County. On the ——day of 1891, plaintiff in error, the Oxley Stave Company, filed its petition in the Circuit Court, City of St. Louis, Missouri, against Butler County, to set aside and annul said decree of the Circuit Court of Butler County rendered November 7, 1869, the petition of plaintiff, alleging that said decree was obtained by fraud. This case was decided by the Supreme Court of Missouri, a court of last resort, at its April term, 1894, and its decision was adverse to plaintiff.

Plaintiff in error filed its petition for rehearing in said cause and same was overruled by said court.

After a final judgment by said Supreme Court, plaintiff in error, sued out a writ of error and brings the case before this honorable court. The defendant in error moves to dismiss or to affirm as follows:

MOTION TO DISMISS.

Comes now defendant in error and moves the court to dismiss the writ of error heretofore sued out of this court and directed to the Supreme Court, State of Missouri, or to affirm the judgment of said court, and as grounds for such motion assigns the following:

1. Because this court has no jurisdiction of the subject matter herein, the defect of want of jurisdiction being apparent of record.

2. Because it appears from the record that the controversy is cognizable by the courts of Missouri and has been therein heard and finally determined by Supreme Court of Missouri.

3. Because the record shows that no Federal question is involved in said suit.

4. Because the record shows that only two questions were presented for determination to the Supreme Court of Missouri, and that these two questions were and

are peculiarly and exclusively within the appellate jurisdiction of the Supreme Court of Missouri, and said court having rendered a decree the decision is final, and no writ of error will lie from that decree.

5. Because the record shows that the matters at issue between the plaintiff and defendant in error are *res judicata*.

6. Because the record shows that plaintiff in error has had his day in court, and merely because judgment was rendered against him, he will not now be permitted to say that he has been deprived of his property without due process of law.

7. Because the record shows that the pretended claims and rights of plaintiff in error presented in this case are without merit and frivolous in their nature, and that to permit plaintiff in error to further protract this litigation would be detrimental to the public interest as tending to impair general confidence in the validity and efficacy of the proceedings and final judgments of courts of competent jurisdiction throughout the land.

BRIEF.

I.

The jurisdiction of Supreme Court of United States does not attach in this case.

Brown vs. Atwell 92 U. S., 327.

De Saussure vs. Gaillard, 127 U. S., 216.

Wood Mowing Machine Co. vs. Skinner, 139 U. S., 293.

Beaupre vs. Noyes, 138 U. S., 397.

Johnson vs. Risk, 137 U. S., 300.

Marsh vs. Nichols, 140 U. S., 344.

N. O. vs. N. O. Water Works, 142 U. S., 79.

Delaware Co. vs. Reybold, 142 U. S., 636.

Eustis vs. Bolles, 150 U. S., 361.

Rutland vs. Cen. Vt. R. R., 159 U. S., 640.

Sayward vs. Denny, 158 U. S., 180.

Fowler vs. Lamson, 164 U. S., 252.

Ry. Co. vs. Chicago, 164 U. S., 454.

II.

The case was decided by the Supreme Court of Missouri, the highest court in the State, and it had jurisdiction, and even if error was committed, this court will not review that decision where the record shows that no Federal question was involved.

Dibble vs. Land Co., 163 U. S., 63.

Bank vs. Ry., 163 U. S., 325.

Arrowsmith vs. Harmoning, 118 U. S., 194.

III.

The property of plaintiff in error was not taken without due process of law.

Kuehl vs. Meyer, 50 Mo. App., 648.

Clark vs. Mitchell, 64 Mo., 564.

Clark vs. Mitchell, 69 Mo., 627.

Gabriel vs. Mullen, 111 Mo., 119.

Davidson vs. N. O., 96 U. S., 97.

Empire vs. Darlington, 101 U. S., 87.

Davis vs. Gray, 16 Wall, 203.

Robards vs. Lamb, 127 U. S., 58.

Freeland vs. Williams, 131 U. S., 405.

Johnson vs. Elevator Co., 119 U. S., 388.

Glenn vs. Liggett, 134 U. S., 533.

Hawkins vs. Glenn, 131 U. S., 319.

Kauffman vs. Wooters, 138 U. S., 285.

Leeper vs. Texas, 139 U. S., 462.

Morley vs. Ry. Co., 146 U. S., 162.

ARGUMENT.

Jurisdiction of the Court.

The record in this case shows that only two questions were presented for adjudication to the Supreme Court of the State of Missouri; (1) were the subscriptions by the county court of Butler to the stock of the Cairo and Fulton Railroad Company and the conveyance of the swamp lands of the county to said railroad company in satisfaction of said subscriptions authorized by law, and (2) ought the decree of the Circuit Court of Butler County, annulling the conveyance, be set aside because procured by fraud, and because two of the defendants named in the decree were dead at the time of its rendition, and the railroad company a dissolved corporation?

Abstract of Record, p. 120.

Oxley Stave Co. vs. Butler Co., 121 Mo., 614.

These two questions were presented to the Supreme Court of Missouri, and in exhaustive opinion covering every point in the case, the Supreme Court decided against the plaintiff in error.

The plaintiff in error contends that the decision of the Supreme Court of Missouri, in so far as the first proposition involved is concerned, had jurisdiction, and that no federal question was involved, and hence its decision is final, and that the only question presented as to jurisdiction arises on the second proposition.

Whether this court has jurisdiction to review the decision of the Supreme Court of Missouri depends upon the manner in which the immunity contended for by plaintiff in error is presented to this court by the record.

Section 709 of the Revised Statutes provides that,

a final decree in any suit in the highest court of a State in which a decision in the court could be had or any title, right, privilege or immunity is claimed under the constitution of the United States and the decision is against the title, right, privilege or immunity, *specially set up and claimed*, may be reheard and reversed or affirmed in the Supreme Court under writ of error.

The defendant in error here contends that no immunity was specially set up and claimed in the courts below by the plaintiff in error, so that this court must look to the general character of the proposition presented and to the pleadings and the evidence and say whether or not a federal question was necessarily involved in the determination of the case by the Supreme Court on the second proposition above stated.

It is undeniably true that there was not a suggestion of, nor a reference to a federal question in the case from start to finish, but, nevertheless, the plaintiff in error contends that he was deprived of his property without due process of law, and that this court by studying these pleadings may infer that he intended to claim the immunity guaranteed under the federal constitution.

Mr. Justice Peckham in

Fowler vs. Lamson, 164 U. S., 262, says:

"Where a case is brought to this court on error from a judgment of a State court, unless it appear in the record that a federal question was raised in the State court before the entry of final judgment in the case, this court is without jurisdiction."

Mr. Justice Harlan in

Ry. Co. vs. Chicago, 164 U. S., 454, sasy:

"This court has no authority to review the final judgment of the highest court of a State in which a

decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege or immunity protected by the Constitution of the United States, unless the party, against whom such judgment was rendered," specially set up or claimed, "such right under that instrument."

The record in this case does not show that the Oxley Stave Co., specially set up or claimed in the State courts or either of them, any right or immunity under the federal constitution.

In fact the record shows that no immunity was claimed until plaintiff in error filed its petition for re-hearing after judgment. Mr. Chief Justice Fuller in Sayward vs. Denny, 158 U. S., 180, says, "That such a claim cannot be recognized as property made, when made for the first time in a petition for re-hearing after judgment."

Mr. Justice Brown in

Wood Mowing Machine Co. vs. Skinner, 139 U. S., 293, says,

"It is well settled by a long series of adjudications that to give this court jurisdiction by a writ of error to a State court it must appear affirmatively, not only that a federal question was presented for decision to the highest court of a State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

De Saussure vs. Gaillard, 129 U. S., 216.

The Supreme Court of Missouri decided in the cases of Dunklin County vs. Chouteau, 120 Mo., and

Oxley Stave Co. vs. Butler Co., 121 Mo. that

the bonds issued by the C. and F. R. R. Co., to Butler

and Dunklin Counties were not authorized bylaw and were fraudulent.

The plaintiff in error by its bill in equity filed in the State Court of Missouri asked for an adjudication upon this proposition, and because the decision of the Supreme Court was not to plaintiff's liking, he complains that he has been deprived of his property without the due process of law.

"Although a case from the highest court of the State may involve a federal question, yet if the court proceeds from another and distinct ground, not involving a federal question, and sufficient in itself to maintain the final judgment without reference to the federal question involved, its judgment will be affirmed here."

Beaupré vs. Noyes, 138 U. S., 397.

Johnson vs. Risk, 137 U. S., 300.

Marsh vs. Nichol, 140 U. S., 344.

The plaintiff in error raised every point that he thought would avail him both as to the law and the facts in the trial court and in the Supreme Court of Missouri, and during all of the years of this litigation made not the slightest allusion to a federal question till after final judgment in Supreme Court.

The plaintiff in error contends that because the two substituted trustees, who were made so, because of the deaths of Watermann and Moore in the original trust deed, have not had their day in court, hence the decree in favor of Butler County was a fraud and they were deprived of their property without due process of law.

Is it true, as a matter of fact, that these two trustees, who now insist to this court that it was absolutely essential to the validity of the decree in favor of Butler County that they should have been made defendants, were not

before the court, and were deprived of a hearing? The record shows with reference to Brayman, one of the trustees, that he employed special counsel to defend him, and that counsel entered the appearance of Brayman, and filed on his behalf a demurrer to the bill in equity, and the reason Brayman was not represented at the trial was because of the fact that he had had a disagreement with his counsel in regard to fees, and just before the trial his counsel withdrew from the case. With reference to the other trustee, Bedford, the record shows that he was the attorney in the case for all of the defendants and appeared in court and acted as such attorney for all parties, and that he was present in court on the day of trial, but having withdrawn for some reason best known to himself as attorney, appeared on the day of the trial in open court as a *friend of the court*, and objected to the proceedings because of the want of jurisdiction in the court, for the reason that he and his co-trustee, Brayman, had not been personally served with summons and the railway company a dissolved corporation.

It seems strange to us that the plaintiffs in error should contend that Bedford and Brayman never had a day in court, when the records show that they were in court for more than a year, and voluntarily took themselves out of court on the day of the trial.

"In order to sustain the jurisdiction of this court upon the ground that a federal question is presented, it should appear either that such question was apparent in the record and that a decision was made thereon, or that from the facts stated such question must have arisen and been necessarily involved in the case."

"If it appeared either that the decision of the State court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds, broad enough in themselves to sustain the judgment without considering the federal question, and that such question

was not necessarily involved, the jurisdiction of this court will not attach."

N. O. vs. N. O. Water Works, 142 U. S., 79.

Delaware Co. vs. Reybold, 142 U. S., 663."

The plaintiff in error in this case does not contend that the federal question was presented to the inferior or Supreme Court of Missouri, but that from the facts stated such question must have arisen and been necessarily involved in the case.

We believe that after an examination of the record the court will be of the opinion that the decision in regard to the validity of the subscriptions of Butler County to the C. & F. Ry. Co., and the bonds which were issued upon the strength of such subscription were fraudulent and void, and that the determination of such a question is sufficient in itself to determine the proposition that the decision was made upon rules of general jurisprudence and broad enough in themselves to sustain the judgment without considering any other question involved.

"The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation.

"There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case and the jurisdiction by this court invoked simply for the purpose of delay." N. O. vs. Water Works, 142 U. S., 87.

Plaintiff in error raised the issue below by his bill in equity, and every question presented by him was fairly and fully considered by the Supreme Court of Missouri, and determined against him, and this court should turn a deaf ear to his entreaties for assistance, for the reason that a federal question was an after-thought, and seems only to have been invoked for the purpose of delay.

There is no averment in the pleadings, that the federal question is involved; none was presented to the Supreme Court of Missouri. No federal question arises out of the decision, or is necessary to the determination of the case.

The validity of the decree of the Circuit Court of Butler County was attacked by plaintiff in error, and vigorously, upon the ground that it purported to vacate and annul the patent and mortgage when the parties in interest had no opportunity to be heard.

"The parties in interest" at that time were the railway company, which was present in court by virtue of service of summons upon the president of the railway company and the three living trustees, and they were present during the major portion of the time that this case was pending in the courts, from 1866 to 1869, before the trial; one of them, "Wilson," was served as the laws of Missouri direct, the other, "Brayman," was represented in the case by counsel; the other trustee, "Bedford," was present in court on the day of trial, and yet plaintiffs in error contend that the parties in interest had no opportunity to be heard.

"It is well settled by a long series of decisions by this court that where the highest court of a State in rendering judgment, decides a federal question, and also decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the federal question.

Eustis vs. Bolles, 150 U. S., 361.

Rutland Ry. Co. vs. C. Vt. Ry., 159 U. S., 630.

Dibble vs. Land Co., 163 U. S., 63.

Bank vs. Ry. Co., 163 U. S., 325.

Even if the decision of the Supreme Court of Missouri was erroneous, yet if it had jurisdiction, this court will not reverse because of error.

Arrow Smith vs. Harmoning, 118 U. S., 194.

II.

Title to the Land.

The subscription of Butler County to the Cairo and Fulton Railroad Company and a conveyance of lands to satisfy such subscription was not authorized by the law of 1853, February 24, Sections 29 and 32.

The purpose of the donation of these swamp lands to Butler County, was: First, that they might be rendered tillable; second, that they might be sold.

A county might convey title to swamp lands under the law of the State of Missouri by commissioner's deed from March 10, 1869, until the Revised Statutes of 1879 went into effect, but at no other period of our law.

See Acts 1851, pp. 53–55.

Pool vs. Brown, 98 Mo., 681.

County officials cannot do indirectly what they are not allowed to do directly.

The contention in this case is that the railway company became possessed of the title to the lands in dispute by patent from the Governor of the State in 1857. The County of Butler claims that no title to these lands ever passed to the railway company by virtue of the patent from the State of Missouri in 1857 or at any other period of time because the patent was issued in violation of the law of the land as it then stood upon the statute books.

No petition as required by law, was ever signed by a majority of the voters of Butler County, and no vote of

the taxpayers of said county was ever taken, and the certificate of the county clerk to register of lands declaring that the law had been complied with, was not true as a matter of fact and was a fraud upon the county and the Supreme Court of Missouri has so held.

It is undeniably true, and was so held by the Supreme Court of Missouri, in Dunklin County vs. Chouteau, and also in this case, that a vote of the taxpayers of Butler County was essential to a valid subscription to the bonds of the C. & F. Railway Company, and further not one cent was ever paid to the county by the railway company for these lands.

The title of plaintiff in error is through the deed of trust dated May 23, 1857, which was bottomed upon the patent made by the Governor of the State of Missouri on behalf of Butler County, conveying the land to Waterman, Woore and Wilson as trustees.

The plaintiffs in error maintain, and urge most earnestly upon this court, that, because of the decision of the Supreme Court of Missouri in this case, that they have been deprived of their property without due process of law.

The plaintiffs in error concede that the Supreme Court of the State of Missouri had an absolute right to declare that the subscriptions by the County Court of Butler County to the stock of the C. & F. Railway Company and the conveyance of swamp lands by said county to said railway company in satisfaction of said subscriptions, were not authorized by law, and that this court has not the jurisdictional power to review that decision on this point, but that the question arises for adjudication and determination by this court is, "ought the decree of the Circuit Court of Butler County annulling the conveyance of said lands be set aside, because procured by fraud, and because two of the defendants were dead at

the time of the rendition of the decree and the railway company was a dissolved corporation."

The plaintiffs in error claim that when the said suit of Butler County vs. the Railway Company and its trustees was brought, and when said decree was rendered, the legal title to the lands involved, was not in said railway company, and said Moore, Waterman and Wilson the trustees, but in the directors of said company and in John Wilson, Mason Brayman and Henry H. Bedford, the substituted and surviving trustees.

The record discloses that after said decree was entered in favor of Butler County against the Railway Company and its trustees, that said railway company, in its own behalf, in 1871, brought a bill in equity to set aside the decree rendered against it and in favor of Butler County, because Butler County had obtained the decree by fraud.

The plaintiffs in error admit, and the fact is that its title is derived solely through the substituted trustees in that deed, namely Mason Brayman and Henry H. Bedford, and assert that these trustees were essential and necessary parties to the determination of the case, and should have been served by summons to appear before the Circuit Court in Butler County, to defend the interests they represented.

The record shows that Waterman and Moore, two of the original trustees to the deed of trust, had deceased long prior to the time of the trial in 1869, and the record further shows that the railway company, which plaintiffs in error claim was dissolved in 1866, went ahead after 1866 in the usual course of its business by the holding of meetings and electing directors, and also electing trustees to act under that original deed of trust, and also by bringing an action in its own name against the County of Butler to annul and set aside the decree in favor of Butler County against it.

If the Supreme Court of the State of Missouri is right in its opinion, which declares, that the subscriptions to the bonds of the C. & F. Railway Company are void, then the defendants in error herein claim that the bonds issued by virtue of said subscription are void.

The record shows that at the trial of the case of Butler County against the railway company and the trustees, the parties in interest were represented by counsel, and that one of the attorneys, Bedford, answering for the railway company and its trustees, had been for years a director of the company, and was at the time of the trial a substituted trustee under the mortgage, and that he was present in court, and protested against the proceedings because he had not been summoned to appear in court, and further, that Mason Brayman, the other substituted trustee, had employed, or did employ, special counsel, Mr. Chapman, to represent him in the litigation, and that the only reason Mr. Chapman did not appear at the trial and defend Mr. Brayman's interest was that Brayman had agreed to pay Chapman $500 for his services as counsel and had failed to do so.

The plaintiffs in error insist that the directors of the company should have been made parties defendants in the suit. In regard to this point, the Supreme Court, on the case of Chouteau vs. Allen, 70 Mo., page 343, stated that "under the statutes of the State of Missouri, the president and directors of a corporation which has been dissolved, are made the trustees to settle its affairs, sue for, and recover its debts, property, etc., yet those who, in 1866, professedly occupied those official positions, appear never to have acted as trustees; on the contrary; we find them refusing to act in that capacity, and, by answer, denying that they had, at the time of the sale of the road, occupied any official position in the company. This being the case, it would certainly seem a hardship, too great to be tolerated to impute laches to

counties interested in these lands, and let them suffer under these circumstances when abandoned and betrayed by their official protectors, their wrongs unsuspected, their rights unknown and when nothing short of extraordinary vigilence could have secured redress of the one, or a recognition of the other."

There were no directors when anything was attempted looking to the protection of the interests of the counties in these lands.

The C. & F. Railway Company seems to have been a dissolved corporation at times when it suited the purpose of the parties trading in these lands that it should be so, and to have been a very active entity at other times when these traders thought that they would be benefited by reason of the assertion by the railway company of its corporate functions.

"Although a corporation has ceased the prosecution of the objects for which it was organized, its corporate powers remain unimpaired for the collection of debts, the enforcement of liabilities and the payment of its creditors."

Hawkins vs. Glenn, 131 Mo., 319.

Glenn vs. Liggett, 134 U. S., 533.

"Railway company held not to have forfeited its franchise though the conditions of its creation were not fulfilled if good reasons abrogated their fulfillment."

Davis vs. Gray, 16 Wall, 203.

The plaintiffs in error contend that the validity of the mortgage to the railway company and the title to the lands conveyed by the mortgage had passed to the company, and that its bonds were a valid incumbrance, and had been approved by the Supreme Court of the State of Missouri

in a most unequivocal manner, and rely upon the case of Chouteau vs. Allen, 70 Mo., 290.

In this case the court will notice that the attack made upon these bonds was as to the *form* of the deed of trust and the manner of its acknowledgment. (See page 324 of decision). In *this case*, the attack was made by Butler County to the substance, that is, that the deed of trust and bonds issued upon the same were void absolutely because they had been obtained by fraud.

The C. & F. Railway Company got these lands from Butler County and never paid one cent for them and proceeded to issue bonds and convey the land to trustees and trading began soon thereafter by parties "on the inside," both in the lands and the bonds.

The plaintiffs in error insist that the decree of the Circuit Court of Butler County, rendered July 2, 1869, which purports to vacate and annul the patent to the railway company made in 1857, and the mortgage given to secure its bonds, is a nullity.

If the original patents and deeds were void, and the Supreme Court of the State of Missouri has so decided, then the conveyances, trading and transactions which were had because of such void deeds were of no force or effect. The Supreme Court of the State of Missouri in this very suit has held that the railway company was not a dissolved corporation at the time of the institution of the suit in 1866 of Butler County against it, stating that it rendered its first opinion on demurrer when all the facts were not before it. The attempt to make Mason Brayman a title trustee under that deed is a failure, because the evidence shows that the trust deed conveyed a legal title to the lands to only three trustees, John Moore, John Wilson and Albert Waterman, and they are properly called the title trustees, and any two of them had a right under the deed to fill a vacancy. Waterman died in 1862, and Brayman was elected trustee in 1866 to succeed

him by the *plurality of his own vote*, and this election of Brayman by himself was approved by the railway company, acting in its official capacity, on April 11, 1867.

The plaintiffs in error insist that the railway company ceased to exist in October, 1866, yet he cites an action of the company in April, 1867, to sustain him in his contention that Brayman was rightfully elected trustee, and that such election was approved by the railway company as the deed required. This is an inconsistency in plaintiff's argument to which we respectfully invite the attention of the court.

The plaintiffs in error claim that the railway company ceased to exist in 1866, yet says that he has been deprived of his property contrary to the provisions of the Federal Constitution, because a trustee who was *appointed by the railway company* in 1867 was not served with process.

The president of the company, Green L. Poplin, did right as president, in 1867, to certify to the appointment of Brayman and Bedford as title trustees under that deed, yet did wrong, and was not in fact president in 1866, when he accepted summons in the suit that Butler County instituted against his company.

The plaintiffs in error by filing its bill in chancery to set aside the decree rendered in favor of Butler County in 1869 against the railway company, raised a monster which should be the cause of its own destruction, because the decisions of the Supreme Court in this State, in relation to the swamp lands. for the first time went really into the merits of the case and investigated the beginning of the transactions between the officials of these counties, the railway company and its trustees; and because of the charge of fraud made by plaintiffs in errror in this case, the Supreme Court has solemnly said that the patent issued in 1857 to the railway company was void because issued upon false and fraudulent statements that certain

county officials made to the register of lands of the State of Missouri, and that the bonds were fraudulently issued.

This court in the case of Freeland vs. Williams, 121 U. S., 405, says: "A bill in chancery is one of the recognized processes of law for re examining a judgment and enjoining its execution, and is in its form, due process of law."

The plaintiffs in error thus invoked by their bill in chancery in this case the due processes of law which the constitution guarantees to them, and because of an adverse decision, they appeal for relief here.

"State legislation simply forbidding a party to come into court and challenge its jurisdiction over him without surrendering himself to the jurisdiction of the court, but which does not restrain him from fully protecting his property and his rights against any attempt to enforce a judgment rendered without due process of law, is not a violation of the fourteenth amendment."

Johnson vs. Elevator Company, 119 U. S., 388.

Every fact which this court is asked to pass upon, every principal of law claimed by plaintiffs in error in this case were presented by them to the Superme Court of the State of Missouri, and that court adjudicated every claim made by the plaintiff in error on its behalf when it rendered its decision.

"The adjudication of a person's claim, by the courts of his own State, is due process of law."

Morley vs. Railway Compamy, 146 U. S., 162.

Leper vs. Texas, 139 U. S., 462.

The spectacle of Bedford, standing in open court, denying its jurisdiction because the suit was against a dissolved corporation and because he was a substituted trustee

under that original trust deed and had not been served with process, is strange indeed, because he could not have been made a trustee and was not a trustee, unless the railway company could and did exercise its functions as a corporation in 1867, when he, Bedford, was elected trustee. In one breath he says that the railway company was dissolved in 1866, and in the next he asserts in open court that he was elected trustee and director of the company *by the company* in 1867.

Mason Brayman, the other trustee, claiming that the judgment was void because he was not personally served with summons, yet he was constituted a trustee by his own vote, and his action was ratified by the railway company nearly one year after he says that the railway company was dissolved, and he was during a long period of time before the Butler County Circuit Court defending against the contention that the deed under which he was acting was a fraud, and only disappearing from the eyes of the court on the day of the trial, and that because he had not paid his attorney, who had represented him, as he had agreed to do.

These two men practiced a fraud and deception upon the court by appearing and defending and then disappearing on the day of the trial, and the plaintiffs in error who claim under and through these two men, are here seeking to take advantage of the wrongs perpetrated by them. The courts of the land will not countenance such action.

We are impressed with the belief that after an inspection of the record in this case, the court will conclude that the jurisdiction of this court is invoked simply "for the purpose of delay," and we ask for damages under the rules of court.

Even if this court should determine that it has jurisdiction in the case, yet if, after an inspection of the record

it should conclude that the writ was improvidently sued out, then we ask for an affirmance with damages.

Respectfully submitted,

FRANK M. ESTES,

HENRY N. PHILLIPS,

For Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1896.

Supreme Court, U. S.
MAR 11 1897
JAMES H. McKENNEY,
CLERK

No. 221.

F. G. OXLEY STAVE COMPANY and F. G. OXLEY, Trustee,
Plaintiffs in Error,

vs.

THE COUNTY OF BUTLER, THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY and the ST. FRANCIS LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

JOHN F. DILLON,
WINSLOW S. PIERCE,
HARRY HUBBARD,
Of Counsel for St. Louis, Iron Mountain and Southern Railway Company.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 221.

F. G. OXLEY STAVE CO. and F. G. OXLEY, Trustee,
Plaintiffs in Error,

AGAINST

THE COUNTY OF BUTLER, THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY and the ST. FRANCIS LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Brief for the St. Louis, Iron Mountain and Southern Railway Company.

Statement of the Case.

This was a suit in equity brought in October, 1893, by the plaintiffs in error, the F. G. Oxley Stave Company and F. G. Oxley, Trustee, against the County of Butler, in the State of Missouri, the St. Louis, Iron Mountain and Southern Railway Company, and about

seventy-five (75) other defendants, to quiet title of said plaintiffs to certain lands in the State of Missouri.

THE AMENDED PETITION of the complainants (Record, pp. 12–22) made allegations substantially as follows:

That the United States by Act of Congress approved September 28th, 1850 (9 Stats., 519), granted to the State of Missouri the swamp lands thereafter in said amended petition described, and that afterwards the State of Missouri, by an Act approved February 23d, 1853 (Session Laws of Missouri, 1852, p. 108), granted the said described lands to the County of Butler in said State. It may here be noted that the State of Missouri had previously, by the Act approved March 3, 1851, donated the swamp lands which it received from the United States to certain of the Counties in which they were situated (Session Laws of Missouri, 1851, p. 238), but excepted from this grant to the counties lands situated in Butler and in certain other specified counties. The Act of February 23d, 1853, in effect extended the grant made by the said Act of March 3, 1851, to Butler County and other specified Counties.

The plaintiff further alleged that the State of Missouri passed an Act approved February 24, 1853 (Sessions Laws of Missouri, 1852–3, p. 121), by which *inter alia* it authorized any county in the state to subscribe for the capital stock af any railroad company organized under said act, and authorized any such county so subscribing for such capital stock and having swamp lands to use, sell or mortgage said lands for the purpose of paying such subscription.

That afterwards, on or about January 12th, 1854, the Cairo and Fulton Railroad Company was organized and incorporated under said Act approved February 24th, 1853 (See Articles of Association, Record, pp. 27–29).

That afterwards the Legislature of Missouri passed an Act approved December 7th, 1855 (Local Acts of Missouri, 1855, p. 353) authorizing the County Court of Butler County to subscribe to the capital stock of the Cairo and Fulton Railroad Company, and to pay the amount of such subscription in the swamp lands belonging to the County. That, afterwards, the legislature of Missouri passed an Act of December 10th, 1855, to secure the completion of certain railroads in said State (Local Acts of Missouri, 1855, p. 472), which provided that it should be lawful for any county in said state having swamp lands to subscribe the same as stock to any railroad which might pass through such county.

That on October 24th, 1855, the County Court of Butler County, in pursuance of said acts, subscribed for $50,000 of capital stock of the Cairo and Fulton Railroad Company and provided that said subscription be paid out of the swamp lands of said county (See order of County Court, Record, p. 30). That afterwards, December 6th, 1855, the District County Court of Butler County ordered that the swamp land of said County, when selected by the Cairo and Fulton Railroad Company, be transferred and conveyed to it at $1 per acre, and appointed Daniel L. Jennings to execute a deed to said County (See copy of Order, Record, p. 31). That on the same date, December 6th, 1855, the District County Court subscribed for an "additional" $50,000 of capital. [The copy of a second order of December 6, 1855, is set forth in the Record, p. 32. It does not appear to be a subscription for an *additional* $50,000 of capital stock as alleged.] Complainant also alleged that afterwards on December 19th, 1856, the County Court directed the Clerk of the Court to certify to the State Register that full payment had been made

by the Cairo and Fulton Railroad Company for all lands selected in said County of Butler as per lists then on file in the office of the Clerk, which lists included the lands afterwards described in the complaint (See copy of order which is made as of December 9, 1856, Record, p. 33). That afterwards on April 20, 1857, the State of Missouri made its patent conveying to the Cairo and Fulton Railroad Company all the lands described in the lists certified by the County Clerk of Butler County, including the lands specifically described in the complaint. Certified copy of the patent was offered in evidence (Record, p. 34).

The plaintiff further alleged that, in order to secure the payment of certain bonds of the Cairo and Fulton Railroad, the said company, on May 23d, 1857, conveyed the lands described in the complaint, together with other lands, to John Moore, John Wilson and A. G. Waterman, in trust to secure the payment of the said bonds. The deed of trust was offered in evidence (Record, p. 34).

Suit of Chouteau vs. Allen.—That afterwards, on December 16th, 1871, Charles P. Chouteau having previously become the owner of the greater portion of the bonds of said railroad company secured by said deed of trust, filed his petition in a Missouri Court to foreclose the deed of trust and have a decree ordering the sale of the said lands to satisfy the amount due on said bonds; and that such proceedings were had in said suit that a decree was rendered and the property described in the trust deed was sold under decree of the Court by Commissioner appointed for the purpose and that said Charles P. Chouteau became the purchaser of all the lands described in the complaint in the present case. A certified copy of the record in this

case of Chouteau (frequently referred to as *Chouteau vs. Allen*) was offered in evidence by the plaintiffs (Record, pp. 35-39), and admitted over the objection and exception of the defendants that they were not parties to said suit of *Chouteau vs. Allen*. The Supreme Court of Missouri, however, reversed the holding of the lower Court on this point and held that the record in the case of *Chouteau vs. Allen* was inadmissible because the defendants were not parties to that suit (Record, p. 129).

The complaint in the present case also alleged that the lands therein described were, on November 19th, 1886, sold by the said Charles P. Chouteau to the F. G. Oxley Stave Company and conveyed to Frederick G. Oxley, trustee. The deed from Chouteau to said plaintiffs was offered in evidence (Record, p. 39), and admitted over the objection and exception of the defendants.

Suit of Butler County resulting in Decree canceling Patent to Cairo and Fulton Railroad Company, and Deed of Trust of that Company.

The plaintiff then further alleged that the F. G. Oxley Stave Company is the owner of the lands in question, but that after the events and things theretofore alleged and after the Railroad Company had issued its bonds secured by trust deed on the said lands to Moore, Wilson and Waterman, as Trustees—to wit, on November 7th, 1866—the County of Butler filed in the Circuit Court of Butler County its petition against the Cairo and Fulton Railroad Company and the said Moore, Wilson and Waterman, Trustees, as aforesaid, for the purpose of canceling and setting aside the said patent from the State of Missouri to the Cairo and Fulton Rail-

road Company, and the deed of trust from said Railroad Company to said Moore, Wilson and Waterman, Trustees. That in said proceeding service was attempted to be had by publication, the plaintiffs therein alleging that Moore, Waterman and Wilson were non-residents of the State of Missouri. That the Cairo and Fulton Railroad Company was brought in as was pretended by personal service, but that complainants aver and charge that the service in the said cause and the pretended appearance of the defendants by their attorney were in fact a fraud and deception imposed upon the Circuit Court trying said cause. That Waterman, previous to the bringing of said action in said Circuit Court, and Moore soon after the bringing of action and before service upon him had been obtained, departed this life, and their successors had been appointed in pursuance of the provisions of the said deed of trust, and that in consequence no service was had in said cause; that the new trustees were not made parties and were not served with process and had no notice of the proceedings. That the other defendant The Cairo and Fulton Railroad Company was not a necessary party for the reason that under an Act of the State, known as the "sell-out Act," the State lien on said railroad had been foreclosed, and the railroad sold before the commencement of said suit, and the company was dissolved; and that L. H. Poplin, who was at one time President of the said Railroad Company and was pretending to be represented and defend said suit, was acting in collusion with the attorneys and agents of Butler County. Plaintiff further alleged that, notwithstanding the court in the said suit of Butler County proceeded to a decree canceling the patent from the State of Missouri to the Cairo and Fulton Railroad

Company, and the deed of trust from said company to Moore, Waterman and Wilson, yet all said pretended proceedings were null and void on account of the collusion of the parties and because the parties holding the title under said deed of trust were not parties to said suit, and because neither the bondholders nor their assigns were in court.

Numerous Parties Defendant.

The complaint then states, also (Record, p. 17), that in the year 1863 a number of judgments were obtained against the Cairo and Fulton Railroad Company, and that, on July 26th, 1867, an execution was issued on said judgments against said company, and levied on a part of the lands described in the complaint in the present case; and that, on September 25th, 26th and 27th, 1867, the said lands levied on were sold by the Sheriff of Butler County to different parties, many of whom have since conveyed the same to others, and that said lands so sold are now claimed by the several parties named (See Record, p. 17 *et seq.*, for a list of these parties—about seventy-five in number). The complaint then alleges that these seventy-five parties have deeds now of record under which they claim title. The complainants also allege that the lands described are "wild and unoccupied," but that the complainants have been in "constructive" possession, keeping a watch over them, &c., and then pray that the court make a decree quieting the title of the plaintiffs.

Answer of St. Louis, Iron Mountain and Southern Railway Company.

The St. Louis, Iron Mountain and Southern Railway Company made its separate answer (Record, pp. 22 to

25), in which, among other things, it made certain denials. It admitted (Record, p. 24) that the County of Butler on November 7th, 1866, filed in the Circuit Court of Butler County its petition against the Cairo and Fulton Railroad Company, John Moore, John Wilson and A. G. Waterman, who claimed to be trustees, and that the object of said petition was to obtain a decree canceling and setting aside the pretended patent from the State of Missouri to the Cairo and Fulton Railroad Company, and the pretended deed of trust from said Railroad Company to said Moore, Wilson and Waterman as Trustees; and averred that due service of process required by law was had upon said Trustees and said Cairo and Fulton Railroad Company, and the decree duly and regularly entered upon said petition in said suit setting aside and canceling said pretended patent and said pretended deed of trust, and that said decree is in full force and effect and binding upon the said named defendants and all parties claiming under, through or by them, and the said pretended conveyances, and that more than 20 years have elapsed since the rendering and entering of said decree, and that by reason of the lapse of time the said decree cannot be in any way challenged or impeached.

The Railway Company also made a general denial of every allegation not specifically admitted or denied.

The Railway Company also averred that it is the true and lawful owner of certain described lands mentioned in the plaintiff's petition, *and has been and is now in the possession thereof*, and that, being so in possession, the F. G. Oxley Stave Company and the plaintiff F. G. Oxley have, by and through themselves, their servants, agents and employees, unlawfully entered upon the said land and cut timber of great value,

and that they are now threatening and proceeding to cut timber, and prays that they be enjoined from their unlawful acts, and for an account of such trespasses and for such other and further relief as may be proper.

OTHER ANSWERS were filed by other defendants containing in substance general denials (Record, p. 26). Evidence was taken in the case (Record, pp. 26-118). Certain parts of this evidence have already been mentioned or referred to.

RECORD IN BUTLER COUNTY CASE.—Among the other evidence offered by the plaintiff was a certified copy of so much as remained on file in the office of the Clerk of the Circuit Court of Butler County in the case of *Butler County against the Cairo and Fulton Railroad Company, John Moore, John Wilson and A. G. Waterman*, which is the suit heretofore referred to as the suit for the cancellation of the patent from the State of Missouri to the Cairo and Fulton Railroad Company, and the deed of trust from that Railroad Company to Moore, Wilson and Waterman as trustees to secure the Railroad Company's land bonds (Record, p. 39). The following appear as parts of the record thus offered by the plaintiffs:

"*The affidavit for publication, order of publication, and the publication itself as to non-resident defendants,* certain orders continuing cause, judgments by default against defendants at various times, *recitals that demurrers were filed* with the following decree,"

which decree is set forth on record (pp. 40, 41).

This decree in terms vacates, annuls and sets aside the patent from the State of Missouri to the Cairo and Fulton Railroad Company, dated April 20th, 1857, and the deed of trust, dated May 23, 1857, from the said Cairo and Fulton Railroad Company to Moore, Wilson

and Waterman, Trustees, both instruments covering the land in question. It is stated in the record in the present case (p. 41): "The pleadings do not appear. It does not appear what was averred, what relief was asked, what defenses were made, but it does purport to divest the title of Waterman, Moore and Wilson under the deed of trust."

THE DEPOSITION OF J. SPENCER WATERMAN was taken (Record, pp. 41, 42), showing that he was a son of ALBERT G. WATERMAN; that ALBERT G. WATERMAN died in Philadelphia in February, 1862.

THE DEPOSITION OF ISAAC VAN NOSTRAND was also taken (Record, p. 42), showing that JOHN MOORE died in the City of Boston September 23d, 1866. The plaintiffs offered in evidence certain alleged instruments of appointment of successor trustees which are set forth in the record (pp. 42–3, 61–2). These are referred to at length later in our argument.

Plaintiffs also offered in evidence the testimony of HORACE D. WILLIAMS (Record, pp. 44–8), THOMAS N. LANE (Record, pp. 48–50), J. W. WALTERS (Record, pp. 50, 51), HOWARD DUNHAM (51), W. M. CRAIG (51–2), and E. R. LENTZ (p. 52), concerning the alleged "constructive possession" by the Stave Company.

It appears from a stipulation in the record (p. 53) that on November 13th, 1888, the St. Louis, Iron Mountain and Southern Railway Company had brought in the Circuit Court of Butler County, Missouri, an ejectment suit against the F. G. Oxley Stave Company and F. G. Oxley, Trustees, for all the lands mentioned in the cross-bill of said railway company and this case was transferred to the U. S. Circuit Court for the Eastern District of Missouri, and that the case was dismissed pursuant to the stipulation that the St. Louis

Iron Mountain and Southern Railway Company might file in the present case an amended answer, or answer and cross-bill, setting up, among other things, a claim for damages done to the lands involved in this suit by the Stave Company cutting and removing timber therefrom. Plaintiffs also offered the testimony of F. G. OXLEY as to how the title to the lands came to be taken in his name (Record, pp. 54-5). Plaintiffs also offered the evidence of HENRY H. BEDFORD regarding the alleged appointment of successor trustees and regarding the Butler County suit (Record, pp. 62-78). Plaintiffs also offered in evidence the deposition of GEORGE H. CRUMB (Record, pp. 82-4) regarding the appearance of defendants in the Butler County suit.

THE DEFENDANTS OFFERED IN EVIDENCE, among other things, a contract between the St. Louis, Iron Mountain and Southern Railway Company and Butler County for swamp lands, which is set out in the record (pp. 87-8); also a certificate showing consolidation under the present name of the St. Louis, Iron Mountain and Southern Railway Company. They also offered in evidence a *patent from Butler County to the St. Louis, Iron Mountain and Southern Railway Company of the lands in controversy*, said patent being dated December 10th, 1874 (Record, p. 88). They also offered the testimony of JOHN W. EMERSON, who was attorney for the plaintiff in the Butler County case (Record, pp. 88-103), showing the facts regarding the bringing of that suit and the service upon various parties. This testimony will be referred to more at length in our argument. Defendants also offered in evidence the testimony of S. M. CHAPMAN concerning the said Butler County suit. They also offered in evidence the testimony of CHARLES S. HENDRICKS (Record, pp. 108, 113) and L. G. GROVE

114-117), concerning the possession of the lands in question. *Defendants also offered in evidence a patent for the lands in question from the State of Missouri to the County of Butler*, dated February 17, 1870 (Record, p. 117).

The record certifies that it contains "*all the evidence offered*" (Record, p. 118).

The Circuit Court of the City of St. Louis gave judgment for the plaintiffs, and afterwards overruled a motion for a new trial (Record, pp. 118, 119; pp. 7-11). Thereupon the St. Louis, Iron Mountain and Southern Railway Company took an appeal to the Supreme Court of Missouri (Record, pp. 11, 12). The Supreme Court of Missouri heard the appeal and reversed the decision of the Circuit Court of the City of St. Louis (Record, pp. 119, 120). See opinion of Supreme Court (Record, pp. 120-132). Afterwards a motion for rehearing was made by the F. G. Oxley Stave Company (Record, pp. 133-136), to which motion the County of Butler replied (pp. 137-141). The Supreme Court of Missouri, after considering this motion for rehearing, denied the same (Record, 141). Thereupon the F. G. Oxley Stave Company and F. G. Oxley, Trustee, filed their Assignment of Errors (Record, pp. 5, 6) and obtained a Writ of Error, bringing the case to this court (Record, p. 1).

Assignment of Errors.

The Assignment of Errors of the Plaintiffs in Error appear in the Record at pages 5, 6.

ARGUMENT.

I.

Under the fourteenth amendment to the constitution of the United States there was due process of law in the suit or proceeding by which the county of Butler obtained a decree cancelling the patent from the state of Missouri to the Cairo and Fulton Railroad Company, dated April 20, 1857, and the deed of trust from the said railroad company to Moore, Wilson and Waterman.

The only federal question in the present case is whether there was due process of law in the suit brought by Butler county against the Cairo and Fulton Railroad Company and Moore, Wilson and Waterman, trustees, on November 7, 1866, for the purpose of cancelling the patent from the state of Missouri to the said railroad company, and the deed of trust from that company to said Moore, Wilson and Waterman, trustees. The complainants in the present suit sought to have the decree in the Butler county suit vacated and set aside as a part of their case in the present suit (1) for alleged fraud in obtaining the decree, and also (2) on the alleged ground that the proper parties were not served with process.

(1.)

(a) **The supreme court of Missouri decided that the Butler county decree was not obtained by fraud** *(Record,* pp. 125–127*).*

This decision was correct on the evidence. But, whether it was correct or not, it was the decision of a question of fact, and its correctness will not be reviewed by this court.

Quimby vs. Boyd, 128 U. S., 488, 489.
Baldwin vs. State of Kansas, 129 U. S., 52, 57.
Dower vs. Richards, 151 U. S., 658.

Even if it were the fact that the decree in the Butler county suit should not have been made for the reason that there was no fraud or other fact proved as a basis on which to make such decree, still that is not a reason why the decree in that suit should now be set aside. A decree of a court can be set aside only for fraud, accident or mistake **in the procuring of the decree,** and not because any of the matters that were in issue in the suit which resulted in the decree were or were not correctly decided. As to all such matters, including any question of fraud, the time to raise any issue was in that suit itself, and the adjudication of them is a complete bar.

United States vs. Throckmorton, 98 U. S., 61.
Vance vs. Burbank, 101 U. S., 514.
Johnson vs. Waters, 111 U. S., 640.

No fraud *in procuring the decree* was proved.

(b) But, even if there were fraud in procuring the decree, that fact presents no federal question. It is well settled that the question whether a judgment or a conveyance or other instrument is obtained by fraud is not a federal question, and is not reviewable by this court.

To sustain this proposition we need only to refer to a few decisions of this court.

In *McKenna vs. Simpson*, 129 U. S., 506, this court dismissed a writ of error to the supreme court of the state of Tennessee on the ground that (p. 512):

> "The decision of the state court as to what should be deemed a fraudulent conveyance does not present any federal question, nor does the application by this court of the evidence in reaching that decision raise one."

In *California Powder Works vs. Davis*, 151 U. S., 389, the facts were that two parties had claimed title to the same land in California, each under a Mexican grant made prior to the treaty of Guadaloupe Hidalgo, and each under a patent from the United States, and one of them filed a bill in equity against the other in a state court to quiet title, and such proceedings were had that the state court gave a decree that the defendant's title was procured by fraud, and the relief sought for was granted, and this decree was affirmed by the supreme court of California. The case was brought on writ of error to the supreme court of the United States, and the writ was there dismissed on the ground that there was no federal question.

In the case of *Lent vs. Tillson*, 140 U. S., 316, which arose on the validity of an assessment for widening Du-

pont street, in San Francisco, the question was whether the statute, as administered, deprived a party of his property without due process of law. In regard to the question whether there was any fraud or error in the administration of the statute, the court said (p. 330):

"It is contended, however, that the act was so *administered* as to result in depriving the plaintiffs of their property without due process of law. This contention is material only so far as it involves the inquiry as to whether the tribunals charged by the statute with the execution of its provisions acquired jurisdiction to proceed in respect to the lots or lands in question and the owners thereof. Jurisdiction was, of course, essential before the plaintiff's property could have been burdened with this assessment. But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court, in its re-examination of the judgment of the state court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law."

The court further says (p. 333):

"Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the board of commissioners, was himself the owner of a lot on Dupont street, and, for that reason, was incompetent to act as one of the board of street commissioners; that some of the alterations and modifications of the report of the commissioners made upon the hearing in the county court of the petitions filed by different parties were so made under private arrangements between the commissioners and those parties, of which other property-owners along Dupont street had no notice, and by which such owners were injuriously affected; that the board of commissioners selected experts to 'assist' it in estimating the damages for property taken and injured by the proposed improvement and the benefits accruing therefrom, and that the report of those experts was accepted by the commissioners, without themselves making or attempting to make an appraisement of damages or an assessment of benefits under the statute; and that such ap-

praisement and assessment were not, in fact, correct, fair or just, but were fraudulent. In respect to all these and like objections it is sufficient to say that they do not necessarily involve any question of a federal nature, and, so far as this court is concerned, are concluded by the decision of the supreme court of California."

(2.)

The Decree in the Butler County suit was not invalid for want of proper parties or of proper service of process.

The following are the facts with regard to the parties in the suit of Butler county against the Cairo and Fulton Railroad Company, John Moore, John Wilson and A. G. Waterman, which suit resulted in a decree for the cancellation of a patent from the State of Missouri to the Cairo and Fulton Railroad Company, and the deed of trust from that company to the said Moore, Wilson and Waterman, trustees, and which the supreme court of Missouri held to be an estoppel against the plaintiffs in the present case.

The patent from the State of Missouri to the Cairo and Fulton Railroad Company was dated *April 30, 1857* (Record, p. 34). The deed of trust of the lands in question, made by the Cairo and Fulton Railroad Company to Moore, Wilson and Waterman, trustees, to secure the land bonds of that company, was dated *May 23, 1857*, and recorded *December 13, 1859.*

The *suit of Butler county* against the Cairo and Fulton Railroad Company and the said trustees *was begun*

November 7, 1866 (Record, pp. 15–24; Opinion of Supreme Court, p. 122). The parties defendant to this suit were the Cairo and Fulton Railroad Company, John Moore, John Wilson and A. G. Waterman.

The complaint in the present case states that it was alleged in the said Butler County suit that said Moore, Waterman and Wilson were non-residents, and that service of them by publication was therefore had or attempted (Record, p. 15, middle).

It appears as a fact in the Record in the present case that there was in the Butler County case "an affidavit for publication, order of publication and the publication itself as to non-resident defendants" (Record, p. 39, bottom).

But plaintiffs in the present case say that two of the three trustees had died.

It appears from the deposition of J. Spencer Waterman, son of said Albert G. Waterman, that said *Albert G. Waterman*, one of the trustees, *died in February, 1862*, in the City of Philadelphia (Record, pp. 41, 42; Opinion of Supreme Court, Record, p. 122, bottom).

It also appears from the deposition of Isaac Van Nostrand that *John Moore*, another one of the trustees, died in Massachusetts *September 23, 1866* (Record, p. 42; Opinion of Supreme Court, Record, p. 123).

If these were the facts—namely, that Waterman and Moore had died prior to the commencement of the Butler County suit—then the trust title, powers and duties survived in Wilson. This, says the Supreme Court of Missouri (Record, p. 130), "was the rule at common law, and was unaffected by our statute abolishing joint tenancy in certain cases." On this matter of common law and statute law the decision of

the Missouri Supreme Court is final, and not reviewable by this Court.

New York Life Ins. Co. vs. Hendren, 92 U. S., 286.
United States vs. Thompson, 93 U. S., 586.
Chicago Union Bank vs. Kansas City Bank, 136 U. S., 223, 235, and cases there cited.

The trust title, therefore, was in Wilson, the surviving trustee; and, if he was properly served, the decree in the Butler County suit was effective to cancel the trust deed.

It was not necessary to make parties all the numerous holders of the bonds secured by the trust deed.

Kerrison vs. Stewart, 93 U. S., 155, 160.
Shaw vs. Railroad Co., 100 U. S., 605.
Richter vs. Jerome, 123 U. S., 233.
Vetterlein vs. Barnes, 124 U. S., 169.

Service of process in the Butler county suit by publication was due process of law under the Fourteenth Amendment to the constitution of the United States.

The complaint in the present cases alleges (Record, p. 15):

"That in said proceeding [the Butler County suit] service was attempted to be had by publication, the plaintiffs in said cause alleging that Moore, Waterman and Wilson were non-residents of the State of Missouri."

The following appears as part of the record offered by the plaintiffs (Record, p. 39):

"*The affidavit for publication, order of publication, and the publication itself as to non-resident defendants*, certain orders continuing cause, judgments by default against defendants at various times, *recitals that demurrers were filed* with the following decree,"

which decree is set forth on record (pp. 40, 41).

It is well settled that, in actions and proceedings *in rem* affecting the title to lands within a state, service of process by publication on non-residents is due process of law. The state, in such cases, has the *res*—namely, the land—under its control, and may proceed to determine its title. The Butler county suit was not a suit *in personam*, seeking to establish a personal liability against any of the non-resident defendants, but was a suit *in rem* in respect of the title to the lands in question. It is well settled that in such cases notice to non-residents given by publication as provided by statute is all the notice that is required to constitute due process of law.

This court has expressly decided that in a suit to quiet title to real estate service of a non-resident by publication is due process of law.

> *Arndt vs. Griggs*, 134 U. S., 316 (1889); and see cases there cited, among them the well-known case of *Pennoyer vs. Neff*, 95 U. S., 714.

The statute of Missouri in force when the Butler County suit was brought, and which authorized service by publication in case of non-resident defendants, is as follows *(General Statutes of Missouri, Compilation of 1866, p. 655, section 13)*:

"SECT. 13. In suits in partition, divorce, attachment and for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens, and all other liens against either real or personal property, and in all actions at law or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court, if the plaintiff, or other person for him, shall allege in his petition, or file an affidavit, stating that part or all of the defendants are non-resident of the

State, or have absconded or absented themselves from their usual place of abode in this State, or that they have concealed themselves, so that the ordinary process of law cannot be served upon them, the court, or clerk in vacation, shall make an order, directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, and in suits in partition describing the property sought to be partitioned, and requiring such defendant or defendants to appear, on a day to be therein named, and answer the petition, or that the petition will be taken as confessed; and where the court shall be required to make an order of publication, returnable at the next term thereof, there shall not be sufficient time to make publication to such term, the court shall make the order returnable to the first term thereafter that will allow sufficient time for its publication."

In *Lent vs. Tillson*, 140 U. S., 316, referred to *supra*, the notice of the assessment was given by publication. That this notice was sufficient and "due process of law," as required by the 14th Amendment to the constitution of the United States, the court said (p. 328):

"The notice by publication to all who owned property liable to be assessed for the cost of that improvement was appropriate to the nature of the case, and was reasonable in respect to the length of time prescribed for the publication."

So, also, in *Paulsen vs. Portland*, 149 U. S., 30, notice given by publication of sewer assessment proceedings was held to be a sufficient notice to constitute due process of law.

Alleged appointment of successor trustees.

But plaintiffs in error may attempt to claim that some successor or successors had been appointed to Waterman and Moore as trustees.

The 8th clause of the trust deed, which is quoted in the Record at page 35, provides as follows:

"That for the purpose of continuing and securing the due execution of the trusts hereby created, it is declared that all vacancies that may occur in the office of trustee, by death, resignation, or otherwise, shall be filled thus: The first vacancy shall be filled by a majority of the members of the board of trustees as constituted, being in office at the time such vacancy shall take place. The next vacancy shall be filled by the said parties of the first part, and so on alternately until the end, and trustees so appointed shall fill the term and succeed to and perform all the duties and have all the powers hereby conferred upon members of the board of trustees herein named or provided for. They shall constitute and appoint of their own number or otherwise a president of their board of trustees, who shall be a member thereof, and who shall hold his office for such time and have and exercise such powers and duties as they may confer and appoint as fully and with like effect as if herein expressed. Such other officers and agents as shall be necessary to to the execution of this trust may be appointed in such manner as they may determine, rate of compensation fixed, and such rules and regulations made and carried into effect as they may deem necessary."

The plaintiff read in evidence an extract from an order of the board of trustees of the railroad company, reciting the death of Mr. Waterman, and an appointment by John Wilson of Mason Brayman to succeed said Waterman as trustee, of date March 22, 1866 (Record, p. 43; Opinion of Supreme Court, p. 123). This appointment was objected to on the ground that it was hearsay, and that John Wilson was not "a majority" of said board under said trust deed, and could not make said appointment.

Another paper was offered in evidence, purporting to be dated March 7, 1858, and signed by John Moore, John Wilson and A. G. Waterman, appointing Mason

Brayman president of the board of trustees (Record, p. 43; Opinion of the Supreme Court, Record, p. 123).

The plaintiff also read in evidence an appointment by the board of directors of the Cairo and Fulton Railroad Company of Henry H. Bedford as trustee to succeed John Moore, deceased, which appointment was made April 11, 1857. This, it will be noticed, was after this suit was begun.

Alleged appointments were not recorded:

It does not appear that any of the alleged appointments of successor trustees was ever recorded in the Recorder's office in Butler county, nor was there any evidence that Butler county or its attorneys had any notice of said appointments; and for this reason, among others, the Supreme Court of Missouri held that such alleged appointments were not effective to vest any title in the alleged appointees, at least not as against Butler County and the other defendants in the present case who had no actual notice of such alleged appointments (See Opinion of Supreme Court, Record, pp. 128, 130).

The statutes of Missouri, in force when these alleged appointments were made, and at the time the Butler County suit was begun, provided as follows with regard to the recording of deeds and mortgages and other conveyances *(General Statutes of Missouri, Compilation of 1866, pp. 444 et seq.)*:

"SECTION 1. Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by its agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

"SEC. 5. Any private corporation authorized to hold real estate may convey the same by deed, sealed with the common seal of such corporation, and signed by the president or presiding member or trustee thereof; and such deed, when acknowledged or proved, as other deeds of real estate, as by law required to be acknowledged or proved, shall be recorded in the proper office, and have like effect as other deeds."

"SEC. 7. All deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed and sealed by the party granting the same, or by his lawful agent, and shall be acknowledged or proved and certified in the manner herein prescribed."

"SEC. 24. Every instrument in writing that conveys any real estate, *or whereby any real estate may be affected, in law or equity*, proved, or acknowledged, and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

"SEC. 25. Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice."

"SEC. 26. **No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record.**"

This Butler County suit was, therefore, as decided by the Supreme Court of Missouri (Record, p. 131), "Commenced and prosecuted against the parties in whom the record title appeared at the time."

There was not the slightest evidence in the present case that the County of Butler or the St. Louis, Iron Mountain and Southern Railway Company or other defendants, when they acquired title to the lands in question, had any knowledge or notice, actual or constructive, that Brayman or Bedford had ever been appointed a successor trustee prior to the commencement

of the Butler County suit, or at any other time. These purchasers from Butler County clearly had the right to rely upon the title as shown by the records, including the decree in the Butler County suit.

Note that the position of the plaintiffs in the present case is that the decree in the Butler County suit was void as against the trustees under the deed of trust made to Moore, Waterman and Wilson, trustees, for want of Brayman and Bedford being parties in said suit. It is a complete answer to state that the record title, of which alone the purchasers from Butler County were obliged to take notice, was in the name of Wilson and the Cairo and Fulton Railroad Company, and not at all in the name of Brayman or Bedford.

Furthermore, it does not appear that there was any evidence before the Court in the Butler County suit that Brayman or Bedford had ever accepted the trust which plaintiffs allege was conferred upon them, or had ever performed any action in regard to such trust from which an acceptance could be implied (See Opinion of Supreme Court, Record, p. 131).

As was stated by the Supreme Court of Missouri (Record, p. 131), it may be presumed in support of the validity of the decree in the Butler County suit that it sufficiently appeared to the court in that suit that neither Brayman nor Bedford had ever accepted said trust, or even that they had disclaimed the trust. This is certainly consistent with the conduct of Bedford, who himself says he was present in court when the Butler County suit was tried, and did not appear

as trustee in person or by attorney and did not inform the court or the parties to the suit that he had been appointed trustee, though he says he "protested" as "*amicus curiæ*" (Record, p. 71).

Mr. Bedford's testimony does not agree with that of Mr. Chapman (Record, pp. 105-108) or that of Mr. Emerson (Record, pp. 88-104). But even if his testimony is true it is discreditable to him and adds nothing to plaintiff's case.

His alleged conduct (as testified to by him) is fitly characterized by the Supreme Court of Missouri (Record, pp. 126-7).

Of course, no title vested in the alleged successor trustees Brayman or Bedford unless they in some way accepted the trust expressly or by implication.

Armstrong vs. Morrill, 14 Wall., 120.

Note also that there was no evidence of any conveyance of title to them by the surviving trustees as is usual in cases of the appointment of successor trustees.

The evidence in the present case shows that attorneys appeared generally for the defendants in the Butler County suit.

The burden was clearly on plaintiffs in the present case to show that the defendants in the Butler County suit were not properly served and did not appear in person or by attorney. This the plaintiffs did not prove. On the contrary, the evidence in the present case, as above stated, clearly showed publication as to non-resident defendants in the Butler County suit; and it also further clearly appears from the evidence that the defendants in that suit appeared by attorneys.

JOHN W. EMERSON, one of the attorneys who represented Butler county, testified that the firm of Bedford & Owen and Mr. Chapman appeared generally for the defendants in said Butler county case (Testimony of Emerson, Record, pp. 88–104).

There was produced and offered in evidence a motion paper filed in the said Butler county cause, signed by Bedford, Owen & Chapman, "attorneys for the defendants."

Record, p. 104; Opinion Supreme Court, Record, p. 123.

There was also produced from the files of Mr. Emerson and offered in evidence a copy of a demurrer which he testified was filed in the Butler County suit, and which was signed "Bedford and Owen, attorneys for the defendant," and purports in the body of it to be the demurrer of the defendants (Record, pp. 91, 92; Opinion Supreme Court, Record, pp. 123–4).

S. M. Chapman testified that he was employed by Mr. Bedford, and also by Mr. Poplin, who was president of the Cairo and Fulton Railroad Company, and appeared with Bedford & Owen for the defendants in that suit (Deposition of Chapman, Record, pp. 105–108).

So far as the defendant the Cairo and Fulton Railroad Company was concerned, it is expressly alleged in the complaint of the plaintiffs in the present case that Green L. Poplin was present and defended the suit (Record, p. 16); but also alleged that the Cairo and Fulton Railroad Company had been dissolved, and that he had ceased to be president of the company.

This last allegation must be deemed rather a conclusion of law, on the theory that the company had been dissolved, than an allegation of fact that he was not president. The evidence showed that he was in fact president and acted for the company, and that process was duly served on him as president, and that he, in writing, admitted service (Record, pp. 94, 105; see documents signed by him in 1867, Record, pp. 68-9, 79; see, also, Opinion of Supreme Court, Record, pp. 122, 125).

The question whether the Cairo and Fulton Railroad Company was dissolved by the so-called sell-out act and the proceedings thereunder is a question of corporation law, depending upon the common law and the construction of the statutes of the state of Missouri; and whether the corporation was dissolved, and the directors of the company should have been made parties to the Butler County suit instead of the corporation itself, is wholly a matter of state law, and this question is not reviewable on writ of error to this court.

In *Cornell University vs. Fisk*, 136 U. S., 152, this court decided that the decision of the court of appeals of the state of New York, so far as it held that Cornell university had no power to take or hold any more real or personal property than $3,000,000 in the aggregate, depended upon the construction of the charter and corporate powers of the university, and did not involve

any federal question, and, hence, was not reviewable by this court.

See, also, cases cited *supra*, p. 19.

(3.)

The question whether the decree in the Butler county case was a bar to the suit of the plaintiffs in the present case, considered apart from the question whether the defendants in the Butler county case were brought into court by due process, presents no federal question, and is not reviewable by this court.

In *San Francisco City and County vs. Itsell*, 133 U. S., 65, this court dismissed, *for want of jurisdiction*, a writ of error in a case where the record showed that the question decided in the state court was whether the former judgment rendered against the plaintiff in error was a bar to the action.

(4.)

The decision of the supreme court of Missouri, so far as it refused to hold that the plaintiffs were entitled to relief on the ground of any alleged adverse occupany during the period prescribed by the statute of limitations, did not involve any federal question reviewable by this court.

In *Poppe vs. Langford*, 104 U. S., 770, this court granted a motion to dismiss a writ of error to the supreme court of California, and Mr. Chief-Justice WAITE, giving the opinion of the court, said (p. 771):

"It is clear we have no jurisdiction in this case. All the court decided below was, that in California the title of the true owner of lands is extinguished by an adverse possession under color of right for the length of time which would be a recovery in ejectment. This is not a federal question."

(5.)

So far as the decision of the supreme court of Missouri holds that the plaintiffs in the present case are estopped by the facts in pais regarding this decree, and the lapse of time, etc., it presents no federal question.

In *Michigan vs. Flint and Père Marquette Railroad Company*, 152 U. S., 363, Mr. Chief-Justice FULLER, giving the opinion of the court, says (p. 368):

"The supreme court of Michigan held that the state might be estopped by its acts, conduct, silence and acquiescence; that the only question necessary to be considered and determined was the question of estoppel; and, after a full consideration of the facts applicable to this branch of the case, reached the conclusion that the claim of the state had no foundation in equity, justice or good conscience; that it had become stale; and that the state was estopped to assert title to the lands in question. As its judgment thus rested upon the decision of a question which was not federal, this court has no jurisdiction to review it, and the writ of error must be dismissed (*Adams County vs. Burlington and Missouri Railroad*, 112 U. S., 123; *Israel vs. Arthur, ante* [152 U. S.], 355)."

The Supreme Court of Missouri, therefore, did not err in refusing to hold invalid the decree in the Butler County suit, or in holding that such decree prevented the relief prayed for by complainants in the present case.

In concluding this branch of our argument we call attention to the fact that the Decree in the Butler County suit is to be presumed regular and valid in all respects until and unless there is a clear showing that there was no jurisdiction for want of parties properly served or an appearance equivalent to service.

The plaintiffs came into Court in the present case to attack a decree which was rendered over twenty years ago. The burden was on them to show one of two things :

1. Either that there was fraud in procuring the judgment. This, as we have stated above, is not a federal question, but purely a question of state law, and the decision of the supreme court of Missouri cannot be reviewed on any question of fraud in the procuring of the Butler county decree.

Or, 2. The plaintiffs in the present case must show that the decree was void because of the lack of necessary parties properly served or an appearance equivalent to service. The burden of showing this fact is upon the plaintiffs, and they must prove it by clear and undoubted evidence. The rule is that a decree rendered by a court of general jurisdiction is presumed to be valid, and to have been made after requisite service upon the parties to the suit or their appearance,

until the contrary is proved. Every act of a court of general jurisdiction is presumed to have been rightly done until the contrary appears.

Voorhees vs. Bank of the United States, 10 Pet., 449.
Settlemier vs. Sullivan, 97 U. S., 444.
Grignon vs. Astor, 2 How., 319.
Applegate vs. Lexington and Carter County Mining Company, 117 U. S., 265.
White vs. Crow, 110 U. S., 183.

There was a complete failure of plaintiffs to make out any such case against the validity of the decree in the Butler County suit; hence that decree must stand.

II.

On no theory can it be held that the plaintiffs in error have been deprived of their property without due process of law, for the reason that they never had any property in the lands in question. The decree in the Butler county suit, which they now seek to have annulled, was rendered long before their alleged purchase, and they were not parties to that suit. What they complain of is not lack of due process of law in the present suit, but lack of due process of law in the Butler County suit, to which suit they were not parties.

The plaintiffs claim the property in question under a purchase made by them on November 9, 1886, from

Charles P. Chouteau (Record, p. 39). Charles P. Chouteau derived his alleged title under the purchase at a sale made under the foreclosure of the mortgage to Messrs. Moore, Wilson and Waterman, trustees, and a conveyance by the commissioner thereunder made October 20, 1882 (Record, p. 39). Said foreclosure suit under which said sale took place was instituted in 1871 (Record, p. 35). The present parties defendant were not parties to the said suit (Record, p. 35).

The suit of Butler county, under which the decree was had setting aside the patent from the state of Missouri to the Cairo and Fulton Railroad Company, and the deed of trust from the said railroad company to said Moore, Wilson and Waterman, trustees, was begun November 7, 1866 (Record, pp. 15, 24).

The plaintiffs in error in the present case, at the time of their alleged purchase from Chouteau, and the said Chouteau, at the time of his alleged purchase under the foreclosure sale, took only such title as was left in the trustees, Messrs. Moore, Wilson and Waterman, after the decree in the Butler county suit, which was no title at all. **The plaintiffs in error in the present case, therefore, never had any title to the lands in question, and were not deprived of any property by the decree in the present case.** If the Butler county decree was valid and enforced according to its terms as it stood at the time of the alleged purchase by Chouteau and of the alleged purchase by the plaintiffs in error, they never acquired any title whatever to the lands in question. When they purchased they were bound at their peril to examine the title, and to know whether they were purchasing any property or not. As they obtained no title by their purchase, so they have been

deprived of no property by the failure of the Missouri courts, at their instance, to set aside this decree.

The precise thing of which the plaintiffs in error complain in the present case is that the Missouri courts *failed to set aside the decree in the Butler county suit*, and that such failure deprived them of their property without due process of law. They do not complain that there was not due process of law in the *present* case, but they allege that in the Butler county suit there was not due process of law. If this were the fact, the remedy would have been for the parties to the Butler county suit to sue out a writ of error in that suit, or for the parties to that suit to bring a direct suit to have the decree set aside as having been made without due process of law; but no such writ of error was taken, and no such suit has been brought. No one but the parties to the Butler county suit could come into court to attack it either by writ of error or by a separate suit to set aside the decree. The plaintiffs in error cannot in this collateral proceeding complain of the Butler county decree. They bought and paid their money for something to which their vendor had no title. They cannot now come into court and be heard to set aside and overturn matters and suits to which they were not parties, which had long before settled and determined the title not to be in their vendors.

The supreme court of Missouri accordingly so held (Opinion of Court, Record, pp. 130–132).

III.

For the reasons above stated, the judgment of the Supreme Court of Missouri in the present case was correct, so far as any federal question was presented, and should be affirmed with costs.

JOHN F. DILLON,
WINSLOW S. PIERCE,
HARRY HUBBARD,
Of Counsel for St. Louis, Iron Mountain and Southern Railway Company.

166-648

SUPREME COURT OF THE UNITED STATES.
FILED
MAR 17 1897
JAMES H. MCKENNEY
CLERK.

166-648

15,787.

BRIEF OF PLAINTIFFS IN ERROR IN REPLY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 221.

THE F. G. OXLEY STAVE COMPANY AND FREDERICK G. OXLEY, TRUSTEE, PLAINTIFFS IN ERROR,

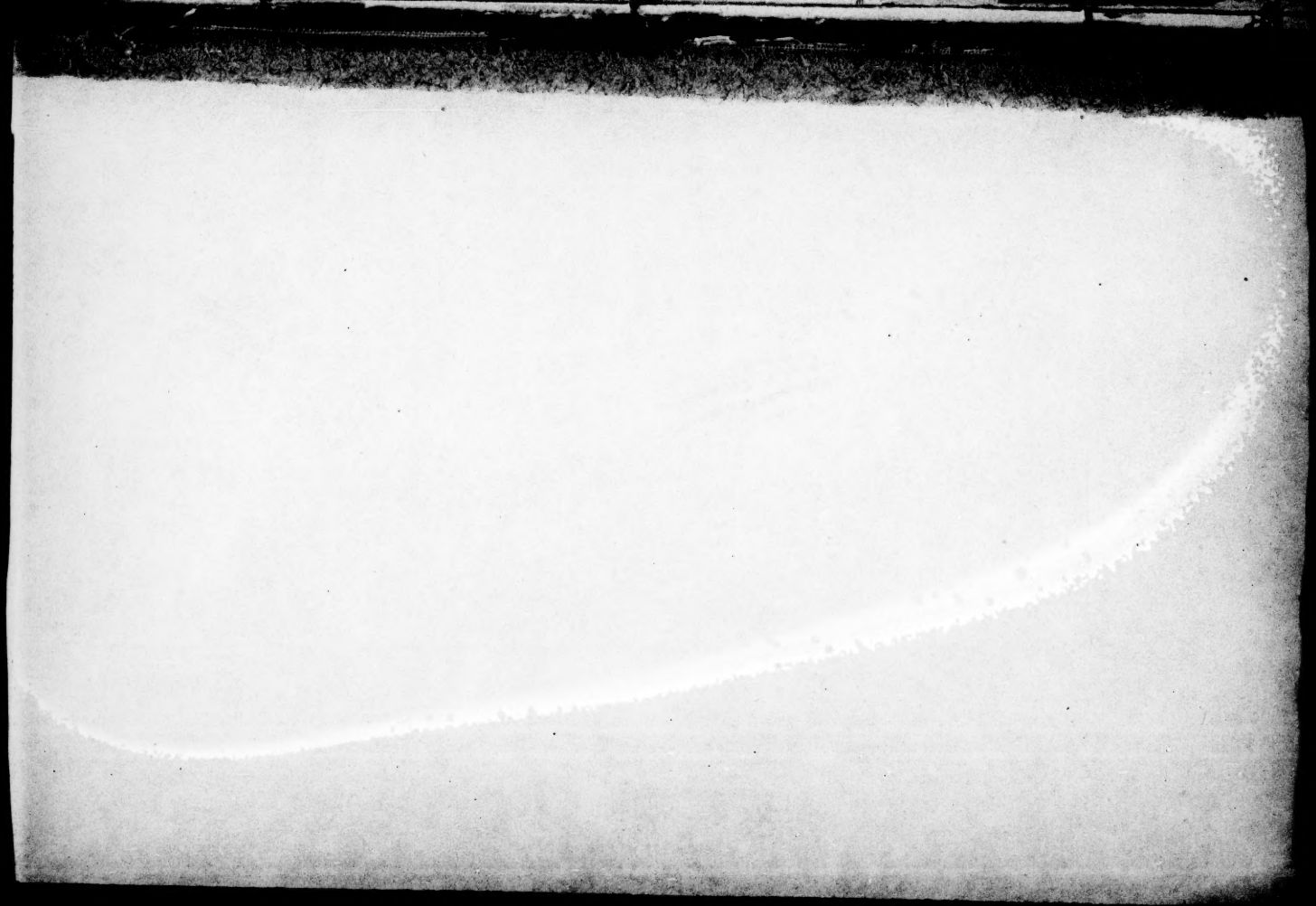
vs.

THE COUNTY OF BUTLER, THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., AND THE ST. FRANCIS LUMBER CO.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

ISAAC H. LIONBERGER,
Attorney for Plaintiffs in Error.

BYRON S. ADAMS, PR.



BRIEF IN REPLY.

Inasmuch as the briefs filed on behalf of plaintiffs and defendants in error differ in certain important respects, the following statement of what the record discloses with regard to the facts in issue is submitted for the information of the court.

I.

Possession of Plaintiffs in Error.

Although the possession of plaintiffs is not denied in the argument, yet, in the defendants' statement of the case (p. 8) an allegation of the answer, "that the defendant railroad company is and has been in possession," is emphasized by italics.

Plaintiffs' possession is established with respect to each of the defendants in the following manner: By the testimony of Williams (Trans., 44); Lane (Trans., 48); Walters (Trans., 50); Lentz (Trans., 52); by assessment-rolls and tax-receipts showing that the lands had been assessed for taxation in the name of the plaintiffs in error, or its grantor, for a number of years (Trans., 54–46); by the fact that defendant, the railroad company, did, on the 13th day of November, 1888, file an ejectment suit for the very lands now involved, alleging that the plaintiffs herein were in possession (Trans., 53). Prior to 1882 the lands were wild, unoccupied swamp lands, but under such circumstances the seizing follows the legal title, and such title was, after the year 1857, in the Cairo & Fulton R. R. Co., or its directors, and the trustees under its mortgage.

There is, therefore, no foundation whatever in the record for the suggestion that the plaintiffs in error are not and have not been for a great many years, in the possession of the lands.

II.

Title of Plaintiffs in Error Irrespective of Decree Complained of.

A most remarkable attempt has been made to show that irrespective of the decree of the Circuit Court of Butler County, the plaintiffs did not have title to the lands involved. (Defts., pp. 32, 33.) That title rests upon the subscription of $100,000 by Butler County to the stock of the Cairo & Fulton R. R.; a conveyance of 100,000 acres of swamp lands to satisfy such subscription; a mortgage made by the railroad company to secure the payment of 1,600 bonds; a decree of foreclosure and sale; three decisions of the Supreme Court of Missouri affirming in the most unequivocal manner the validity of the subscription and conveyance; two decisions of the same tribunal holding that plaintiffs' grantor was entitled to the lands; and the recognition of said title for many years by the County of Butler and the State of Missouri.

Orders of the County Court of Butler County, Trans., 32, 33, 81;
Deposition of Bedford, Trans., 73–78;
Patent and deed of trust, Trans., 34;
Decree of foreclosure and sale, Trans., 35, 39;
Recognition of county, Trans., 46, 54, 81, 82;
Act of February 27, 1857, Acts Mo., 1856–'57, p. 271;
Act of February 19, 1866, Acts Mo., 1865–'66, p. 207;
Act of March 21, 1868, Acts Mo. 1868, p. 62;
Barton County *vs.* Walser, 47 Mo., 200;
Dunklin Co. *vs.* County Court, 23 Mo., 449;
Chouteau *vs.* Allen, 70 Mo., 327;
Dunklin Co. *vs.* Chouteau, 120 Mo., 577.

Notwithstanding the foregoing orders, instruments, decrees, acts and decisions, it is seriously urged that plaintiffs have no title because the decree of the Circuit Court of Butler County rendered July 2, 1869, vacated and annulled the patent and mortgage which constituted links in the chain of their title. This begs the very question now at issue. We object to that decree because it purports to vacate and annul the deed and mortgage under which we claim. The very object of this suit is to ascertain whether said decree is a valid and binding decree. We object to it because we say it was rendered without due process of law. The plaintiffs admit that if it be binding it does deprive us of property; if, on the other hands, it be not a valid decree, then it does not affect our rights and the title of plaintiffs is good.

It is difficult to understand how counsel for defendant at the same time urge that the decree of the Circuit Court of Butler County cancelled and annulled the title which we claim, and that we are not in privity with the parties affected by that decree; yet such is their position. We have already indicated in our former brief precisely how we claim under the directors of the Cairo & Fulton R. R. Co., and the trustees under its mortgage. The only question in the case, as we have repeatedly asserted, is whether or not the decree of the Circuit Court of Butler County is valid. If it is void it ought to be vacated because it purports to deprive us of property. Whether it be void or not is the sole question now presented for adjudication.

III.

Validity of the Decree Complained of.

It is admitted by all parties (Defendant's Brief, p. 17) that in 1862 the legal title to the lands was in the Cairo & Fulton R. R. Co., and in Wilson, Waterman and Moore, trustees under its mortgage; that Waterman died in

1862, and Moore September 23, 1866; that the suit of Butler County was begun November 7, 1866, against said company, the two dead and the surviving trustees; that service of summons was made in 1867 on Green L. Poplin, as president of the company; that the other parties were served by publication; that prior to the commencement of suit Brayman had been appointed trustee, vice Waterman, deceased, by an order of a majority of the board of trustees, duly signed, sealed, and recorded in the official records of the board of trustees; that Bedford had been appointed trustee, vice Moore, deceased, in the same manner, prior to the decree complained of; and that so far as this record shows neither deed of appointment was recorded in the office of the recorder of deeds of Butler county.

On the other hand, plaintiffs affirm and defendant denies that Bedford and Brayman accepted the trust imposed upon them; that the Cairo & Fulton R. R. Co. was dissolved before the commencement of suit; and that the County of Butler had actual as well as constructive notice of the appointment of Bedford and Brayman. With respect to these issues we call the attention of the Court to our previous argument, at pages 70, 82 and 89, and submit—

1. *Brayman accepted the trust. He signed the deed of his* own appointment (Trans., p. 43). He *signed*, jointly with Wilson and Bedford, as trustees, deeds conveying parcels of property covered by the mortgage, pursuant to the power therein conferred (Trans., pp. 69–79).

2. Bedford accepted the trust. *He so testified* (Trans., 66) and his testimony is uncontradicted. He *acted* as trustee. (Trans., 69–79.)

3. The County of Butler *had actual and constructive notice of the death of Waterman and Moore and the appointment of their successors.*

Bedford, who was not a party to the suit, although a legally constituted trustee of the property involved, testified that he happened to be in court when the case was called for trial, and that he there and then got up and protested as *amicus curiæ* that the Cairo & Fulton R. R. Co. was disorganized, and that the board of trustees had not been notified of the suit, and, hence, any proceeding was null and void. "I called the attention of the court that there had been no notice given to the opposite party." (Trans., 71.) The testimony of Bedford is confirmed by a disinterested bystander, a young lawyer named Crum, who testified (Trans., 83):

"Immediately after the case was called a question arose as to whether the parties defendant were in court or had been summoned. Mr. Bedford raised the objection that the trustees for the railroad company and the officers of the railroad company had not been duly summoned and were not represented; that some of the parties were dead. He appeared to be considerably excited and the matter was discussed rather warmly. The plaintiff was represented by John W. Emerson, who claimed that the parties were all in court and had been duly summoned. This Mr. Bedford vehemently denied. I recollect also that some statement was made to the effect that Bedford was appearing in court in the matter. This Bedford denied, and my recollection is that he stated that he appeared as a friend of the court, as *amicus curiæ;* but he protested against any action by the court in the case, because, as he claimed, the necessary parties had not been duly summoned and were not present."

The deed of trust conveyed the title to the trustees named and their successor or successors. The County of Butler was distinctly informed through its attorney that some of the original trustees had died and that the actual trustees were not before the court. Such notice was sufficient, and put the county upon guard at least. Moreover, the deed of trust distinctly provided for vacancies and prescribed the

manner in which they should be filled. The county had notice of the deed of trust; they set it out in their petition. The fact of the death of certain of the trustees must have been known. In the brief of Mr. Estes, filed herein (p. 11), it is insisted that Brayman was in fact a party to the suit because one Chapman pretended to have appeared for him; and that Bedford was a party to the suit because he had protested against the lawfulness of the proceeding. In addition to all these things, Butler County was a stockholder in the Cairo & Fulton R. R. Co., voting its stock, having access to its books, and entitled to all the other rights and privileges of a stockholder. It had appointed by its order Baldwin and Emerson to look after its interest in the road (Trans., 81–82). Upon the records of the road there is an order of the directors reciting the death of Waterman and the appointment of Brayman, and requesting the appointment of Bedford to be trustee (Trans., p. 69). The law under which the Cairo & Fulton R. R. Co. was organized provided that reports should be filed with the Secretary of State, from time to time, setting forth the information which they now say was not obtained. All of these things establish conclusively that the plaintiffs in said suit had actual and constructive notice of the death of the trustees and of the appointment of their successors.

Parties seeking to divest legal estates in land are not permitted to close their eyes and insist that they have seen nothing. They are bound to use the means of information at their command and are charged with notice of such facts as are directly or indirectly called to their attention. Even a purchaser "must look to the title papers under which he buys and is charged with notice of all facts appearing upon their face, of the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or ears to the inlet of information and then say that he was a

bona fide purchaser without notice."- Simmons Co. *vs.* Doran, 142 U. S., 437. A suitor before a court of justice is bound to exercise the same degree of diligence. Even, therefore, if it be conceded that under the laws of Missouri the appointment of substitute trustees should have been recorded, yet facts enough have been disclosed by the record to establish the fact that the county had notice of their appointment and to charge it with the consequences. We submit, however, that where a donee of a power without interest makes an appointment under the circumstances existing in this case, such an appointment need not be recorded. It is not in any sense of the word a conveyance of the lands. Nor is conveyance of the lands required under such circumstances, as the authorities cited in our first brief show. A party having notice of the deed has notice of the consequence of death and of the mode in which a vancancy may be filled. Having notice of the deed he is bound to inquire whether the original grantees be living or dead, and if dead who their successors are. In the present case such information was actually communicated by Bedford; it was constructively communicated in many ways. There cannot therefore be the slightest doubt that the substitution of trustees for those dead was known to the county and its attorney.

If, however, notwithstanding the foregoing considerations, the court be in doubt as to the invalidity of the decree on the aforesaid grounds, yet as the directors of the Cairo & Fulton R. R. Co. were not made parties defendant and it cannot be urged that the county did not have notice of their rights in the premises, the decree must on this ground be annulled. If, when the suit was brought, the Cairo & Fulton R. R. Co. had been dissolved, the directors were indispensably necessary parties and the decree rendered with respect to its property without making them parties defendant and notifying them of the suit, is an absolute nullity

with respect to said directors and all parties claiming under them. The plaintiffs in error claim under the directors of the Cairo & Fulton R. R. Co.

4. The Cairo & Fulton R. R. Co. had been dissolved and extinguished prior to the commencement of the suit. On this point nothing need be added to what had already been said in plaintiffs' first brief (pp. 70–74).

If there still remains a doubt in the mind of this Court with respect to the invalidity of the decree, such doubt ought to be set at rest by the decision of the Supreme Court of Missouri in the foreclosure proceeding entitled Chouteau *vs.* Allen, 70 Mo. 327. This suit was begun *after* the decree of Butler County Circuit Court was rendered. Thomas Allen, who *claimed title by deed from Butler County* (Trans., p. 37), to all of the lands involved, who was made a party to the proceedings *on that ground,* who *set up that title so acquired,* by way of defence in his answer, then presented for adjudication the very question now raised, to wit: whether in 1871, the date the foreclosure suit was brought, two years after the decree now under consideration was rendered, a title derived from Butler County was good or bad; and in this suit the court emphatically decided that the title of Allen so acquired was *then* subject to the mortgage. (70 Mo., 290, 324, 327). If the decree cancelling, vacating and annulling said mortgage and the patent to the railroad company had been regarded as of any value, it was a complete defence to the petition of Chouteau asking a foreclosure of that mortgage, and it is not credible that the parties could have overlooked, and the court could have failed to decide such a matter. Butler County had its day in court by its grantee who set up its title in the foreclosure proceedings. That grantee Allen was then president of the St. Louis, Iron Mt. and Southern R. R. Co., the other defendant

in error. He was also president when that railroad company acquired the discredited title now set up. The decree in the foreclosure proceeding adjudged and determined the very question now raised. All parties were fully aware of this fact. Immediately after its rendition in 1882, Butler County abandoned its pretensions and assessed the lands for *taxation in the name of the purchaser at the foreclosure sale.* The railroad company made no effort whatever for more than fourteen years to assert or establish any title to the lands. Is it conceivable that if any reliance whatever had been had upon the void and fraudulent proceeding now complained of; that if said proceeding had not been universally regarded as abortive, the county and all other claiming under it should have acquiesced in the foreclosure proceedings; that the county should have abandoned rights which a former decree declared them entitled to?

This Court is now called upon to adjudge again what was then adjudged, that a decree rendered in a suit against dead men and a dissolved corporation, in the absence of indispensably necessary parties whose rights were vitally affected, is null and void, because violative of the law of the land.

We cannot conclude without adverting to the remarkable language of counsel for the defendant on page 34 of the brief filed for the St. L., I. M. and S. R. R. Co. They confess that—

"The precise thing of which the plaintiffs in error complain in the present case is that the Missouri courts failed to set aside the decree in the Butler County suit, and that such failure deprived them of their property without due process of law. They do not complain that there was not due process of law in the present case, but they allege that in the Butler County suit there was not due process of law. If this were the fact, the remedy would have been for the parties to the Butler County suit to sue out a writ of error in that suit, or for the parties to that suit to bring a direct

suit to have the decree set aside as being made without due process of law. But no such writ of error was taken and no such suit has been brought. The plaintiffs in error can not, in this collateral proceeding, complain of the Butler County decree."

What defendant's counsel suggest we ought to have done, is precisely the thing we have done. The petition filed in this suit was filed in the Circuit Court of Butler County (Trans., 7), to have the decree rendered by said court on the 2d day of July, 1869, set aside as having been made without due process of law. We claim under the parties to that suit and assert rights which the decree therein rendered purports to divest us of. This is not a collateral proceeding; it is a direct attack. It is a direct attack upon the ground that the decree deprives plaintiff in error of property without due process of law. We have had, of course, a hearing in the present suit, but the result of the present hearing is to deny to us the relief which the Constitution of the United States grants to us. We set up an immunity secured by the Constitution of the United States, to wit: An immunity from a decree rendered without due process of law, and the decision of the Supreme Court of Missouri in the present case is against the immunity specially set up and claimed; therefore, a writ of error was sued out and this Court has been appealed to for redress, where our appeal to the local court was without result.

I. H. LIONBERGER,
Counsel for Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

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JAMES H. McKENNEY,
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ELVERTON R. CHAPMAN,
Plaintiff in Error,

vs.

THE UNITED STATES.

749

Brief for Petitioner Elverton R. Chapman for Writs of Habeas Corpus and Certiorari.

GEORGE F. EDMUNDS,
J. W. WILSON,
A. J. DITTENHOEFER,
Of Counsel for the Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

IN THE MATTER OF THE PETITION OF ELVERTON R. CHAPMAN for Writs of *Habeas Corpus* and *Certiorari*.	No.

BRIEF FOR PETITIONER.

Statement.

The petitioner, Elverton R. Chapman, a resident of the City and State of New York, was, on the 1st day of October, 1894, indicted by the Grand Jury of the District of Columbia, said indictment purporting to be for the violation of Sec. 102 of the Revised Statutes of the United States, making it a misdemeanor for a witness "summoned by the authorities of either "House of Congress" to testify before such House, or any committee thereof, "to willfully make default," or who, having appeared, "refuses to answer any ques- "tion pertinent to the matter under inquiry."

It is alleged in the indictment that Mr. Chapman, during the month of June, 1894, was summoned to testify before a special committee of the Senate, appointed to investigate charges of bribery, &c., sitting at Washington, and, having appeared, he refused to answer certain

questions that were put to him by said committee relating to the operations of United States Senators in sugar stock, through the firm of Moore & Schley (of which the said Chapman was a member), during certain specified months, and while what is known as the "Wilson Tariff Bill" was pending in the Senate. The petitioner having demurred to the said indictment, and said demurrer having been overruled, an appeal was taken to the Court of Appeals of the District of Columbia, where the decision and order of the trial court overruling said demurrer were affirmed, and the defendant ordered to plead (App. Cas. D. C.,).

Thereafter petitioner was arraigned and entered a plea of not guilty, upon which plea trial was thereafter had, resulting in a verdict of guilty as indicted. Motions for a new trial and an arrest of judgment were filed and overruled, and the petitioner sentenced to imprisonment in the jail of the District of Columbia for the period of one month from the date of arrival, and to pay a fine of $100, from which judgment an appeal was also taken to the Court of Appeals of said District, where the same was thereafter affirmed (App. Cas. D. C.,). The petitioner thereupon prosecuted a writ of error to remove said cause to this Court for review, but the same was dismissed, by decision of this Court, for want of jurisdiction to review the decisions of the said Court of Appeals in criminal cases.

After the decision of the Court of Appeals of the District of Columbia overruling the demurrer, to which reference is above made, and before trial was had upon the defendant's plea of not guilty, petitioner made application to this Court for a writ of *habeas corpus*, but the same was denied, upon the ground that such application should be made, if at all, after trial had and other remedies exhausted (156 U. S., 211). Thereupon, and before petitioner was tried upon his said plea of not guilty, petitioner made application to said Court of Appeals for a writ of prohibition to prevent such trial. The same was denied by that Court, and a

writ of error prosecuted by the petitioner to this Court, where the same is now pending, a motion to advance the hearing of the same having been denied.

It will thus be seen that the petitioner herein has invoked every possible legal remedy and proceeding in his endeavor to establish the invalidity and unconstitutionality of the proceedings instituted against him, and of the statute upon which such proceedings were based, and that, having so exhausted said legal remedies without avail, the present application for *habeas corpus* and *certiorari* is made to this the court of last report. It is alleged on behalf of the petitioner that the judgment and sentence of the Court, above referred to, are unlawful and wholly without any jurisdiction or authority in said Court to make the same; and that such sentence of imprisonment and fine is made in violation of the Constitution and Laws of the United States.

BRIEF.

I.

The Act of Congress upon which the indictment was based and conviction had is unconstitutional.

In the printed petition herein (at pp. 7 and 8) will be found set forth Secs. 102, 103 and 104 of the Revised Statutes, U. S., to which we will in this brief refer.

As applied to the present case, Sec. 102, R. S., provides that if any person, summoned as a witness, having appeared, "refuses to answer any question pertinent "to the question under inquiry," he "shall be deemed "guilty of a misdemeanor," &c.

Sec. 103 provides that he shall not be privileged to refuse to testify on the ground that his testimony, or the production of the paper may tend to disgrace him or render him infamous.

These two sections are parts of one scheme, and they are inseparable.

The provisions of this act are, in substance and effect, precisely as though it had been enacted as follows: If any person, summoned before a committee of the Senate shall refuse to testify, even though his testimony may tend to criminate him, he shall be deemed guilty of a misdemeanor and shall be punished, &c.

It can not be doubted that such an act would be void, and we submit that the fact that the division into two sections does not relieve any part of it from this objection.

The intent of Congress is clearly expressed, and no part of the act can be judicially eliminated so as to relieve some other part of the virus that permeates the whole.

Baldwin vs. Franks, 120 U. S., 679.
Prosser vs. Illinois, 116 U. S., 252.
Virginia Coupon Cases, 114 U. S., 269.
United States vs. Reese, 92 U. S., 214.

If Section 103 be eliminated, Section 102, standing alone, is void, because it is a broad provision that if any person shall "refuse" to testify, without any limitation whatever, he shall be guilty of a misdemeanor, &c.

The intention of Congress must be as broad as its language. The Courts cannot limit the scope of the language, nor can the Courts apply the language to cases where Congress would have the power to make the act an offense and exclude others when Congress did not have the power.

This provision, that if any person shall "refuse," is broad enough to embrace a refusal because the answer would commit, and the Courts cannot say that such void part must by the Courts be excluded, and that it

may be operative as to others, nor can the Courts say that Congress did not intend to embrace such acts, that it was not in the power of Congress to embrace.

In the *Trade-mark Cases (100 U. S., 82)*, the Court, at page 98, says:

"It is not within the judicial province to give to the "words used by Congress a *narrower* meaning than "they are manifestly intended to bear in order that "crimes may be punished which are not described in "language that brings them within the constitutional "power of that body."

See also cases cited, *supra.*

But the intention of Congress to embrace cases not within its power is made manifest by Section 103, and it is not in the power of the Courts to revise that intent. Therefore the act is wholly inoperative and void.

II.

Sec. 102 of the Revised Statutes, upon which this indictment is based, is an attempt to delegate to the courts the power of the respective Houses to punish for contempt, and is unconstitutional for that reason.

The grounds upon which we base this contention that Section 102 of the Revised Statutes is unconstitutional are these:

1. It is plainly beyond the power of the two Houses of Congress to strip either one of the Houses of any of those powers and functions which are bestowed

by the Constitution on the Houses respectively, either expressly or by implication.

2. It is conceded everywhere, and is thoroughly settled, that the power of the two Houses to punish for contempt comes to them as incidental to, and by virtue of, the functions which they derive from the Constitution. In other words, the power of the Houses to punish for contempt, whatever the extent of that power may be, is an incident of the powers they get from the Constitution to be parts of the supreme legislature of the United States, to pass laws and to adjudicate matters over which the Constitution gives to them, respectively, the power of adjudication.

This power of the Houses is asserted everywhere, and is nowhere denied, not even in the Kilbourn case *(see Cooley's Const. Lim., 4 ed., s. p. 133, t. p. 101-2-3)*. It is, therefore, thoroughly settled law that from the Constitution, as incidental to the powers thereby bestowed on each House, the Houses are endowed with the power and right to punish for contempt.

3. That this power to punish for contempt is inalienable, either by the separate action of the Houses, respectively, or by the joint act of the two Houses in the shape of a law, is equally plain and settled. Although the power to punish for contempt may be one of the implied powers derived from constitutional grants, it is none the less inalienable; because the implied powers granted by the Constitution stand, in that regard, precisely in the same predicament and class with the expressed powers.

Although neither of the foregoing propositions would seem to require support by any citation of authority, yet we venture to suggest the following authorities on the various propositions just stated.

Regarding the want of power in Congress to deprive either of the Houses thereof of the functions conferred

by the Constitution on them *separately*, it has been steadily held, from the beginning of this Government down, in the adjudications of the Houses of Congress, that no law of Congress can fetter, control, or bind the Houses as to the methods that they will pursue in judging of the election and qualifications of their members.

This is stated in McCrary on Elections, Secs. 348–9; Paine on Elections, Secs. 974, 1003; in the case of *Williamson vs. Sickels*, Vol. 2, Election Cases, 288; *Harrison vs. Davis*, *Id.*, 241, and in numerous other cases. And, so far as we can find, has never been questioned or doubted.

In these cases what the Houses have held in regard to the force of laws providing for the method of conducting contested elections is that they *have not the force of laws*, are not *binding* on the Houses; cannot, by Congress, be made binding on them; and are admitted, in the practice of the Houses, merely as convenient and useful *rules* to be observed as far as convenient and practicable in conducting contested elections.

In regard to the provision authorizing each House to punish its members for disorderly conduct, Story, in Section 837 of his work on the Constitution, says:

"If the power did not exist it would be *utterly im-*
"*practicable* to transact the business of the nation,
"either at all, or at least with decency, deliberation
"and order. The humblest assembly of men is under-
"stood to possess this power, and it would be absurd
"to deprive the councils of the nation of a like au-
"thority. But the power to make rules would be
"nugatory unless it was coupled with a power to *pun-*
"*ish* for disorderly behavior or disobedience to those
"rules."

The indispensable and inalienable character of this power is thus asserted and vindicated, and to say that one of the Houses, or the two Houses, can divest either House of this power is simply absurd.

In regard to the general power of the Houses to punish for contempt, Story (Sec. 845) says:

"It is remarkable that no power is conferred to "punish for any contempts committed against either "House, and yet it is obvious that unless such a "power, to some extent, exists by implication, it *is* "*utterly impossible for either House to perform its con-*"*stitutional functions.* For instance, how is either "house to conduct its own deliberations if it may not "keep out or expel intruders?"

If such be, as it undoubtedly is, the intrinsic value and importance of this power to punish for contempt, namely, that it is utterly impossible for either House to perform its constitutional duties in the absence of said power, then to assert that either House by itself, or the two Houses together, or the President and the two Houses, can abolish such power, is to assert the right to commit a *felo de se*, and to put an absolute end to the Government. Therefore, it is not possible for either House, or the two Houses, to divest itself or themselves of this power.

Again, in Note 4 to Section 1505 of Story on the Constitution, it is asserted that Congress cannot limit or impose restrictions upon the President's *power to pardon.* This is thoroughly settled in such cases as—

United States vs. Klein, 13 Wall., 128.
Armstrong vs. United States, 13 Wall., 154.
Pargoud vs. United States, 13 Wall., 156.
Ex parte Garland, 4 Wall., 380.

Surely, if it is beyond the power of Congress to impair, restrain, limit, or otherwise control that distinct prerogative of the President, the pardoning power, it must, upon the same reasons and principle, be equally beyond the power of the Houses of Congress, and of each of them, respectively, to restrain or limit those separate functions of the Houses, respectively, which are conferred upon them by the Constitution, including this indispensable power to punish for contempt.

Again, in Section 1503 of Story on the Constitution, it is asserted that the President has no power to pardon an offense committed against one of the Houses of Congress. Story says :

" It would seem to result from the principle on which " the power of each branch of the Legislature to punish " for contempts is founded, that the executive authority " cannot interpose between them and the offender. " The main object is to secure a purity, independence, " and ability of the Legislature adequate to the dis- " charge of all its duties. If they can be overawed by " force, or corrupted by largesses, or interrupted in " their proceedings by violence, without the means of " self-protection, it is obvious that they will soon be " found incapable of legislating with wisdom or inde- " pendence. If the executive should possess the power " of pardoning any such offender, they would be wholly " dependent upon his good-will and pleasure for the " exercise of their own powers. Thus, in effect, the " rights of the people entrusted to them would be " placed in perpetual jeopardy. The Constitution is " silent in respect to the right of granting pardons in " such cases, as it is in respect to the jurisdiction to " punish for contempts. The latter arises by impli- " cation, and, to make it effectual, the former is ex- " cluded by implication."

Citing :

Rawle on the Constitution, Ch. 17, p. 177.

So here again, if, for the important consideration here stated, the President is prohibited, by means of the exercise of that unrestricted power to pardon, from in any way restricting, limiting or interfering with a punishment inflicted by one of the Houses under the power of the respective Houses to punish for contempt, then it must be, for the same reasons, equally beyond the power of the Houses, either separately or by means of an Act of Congress, to restrict, impair or interfere with this vital and indispensable function secured by

the Constitution to the respective Houses to punish for contempt.

This theory that this statute, in undertaking to abrogate the powers of the Senate to enforce obedience to its lawful orders and to punish for contempt, is unconstitutional, is no invention of ours. Even as late as the 30th of May, 1894, in the Senate, when it was proposed to certify these refusals to the Grand Jury, it was strenuously opposed by the ablest lawyers in the Senate on the ground, amongst others, that the statute was unconstitutional. One who opposed it was Senator Hill, of New York. What he said will be found at the middle of the first column of page 6496 of the "Congressional Record" of May 30, 1894, where he condemns said statute as unconstitutional in these words:

"It [the statute] does not allow the Senate to judge "of the pertinency of that question. It assumes to "place the whole power of this body under the control "of a committee, and refuses to permit the Senate to "supervise the action of that committee. *The Senate, "under the Constitution, cannot abdicate its powers. No "statute of that kind can stand the test of constitutional "construction.*"

And Senator Hoar, on page 7853 of the "Congressional Record" of June 22, 1894, says to the same effect with that above quoted from Senator Hill, as follows:

"MR. HOAR: It seems to me, if I may be pardoned "for a sentence, *that the Senate is laying down its consti-"tutional authority when it takes the view that its power "to enforce obedience to its lawful order to a witness "who is brought before one of its committees depends on "the action or non-action of a grand jury, or any officer "whatever. If we have the constitutional right to bring "the witnesses here to testify, we have the constitutional "right to compel them to answer, and we are degraded "if we do not do it.*"

There is much else in this debate showing that a

considerable proportion of the legal learning of the Senate regarded the statute as unconstitutional.

The considerations just stated thoroughly establish the proposition that no power exists anywhere, short of actual revolution, to take away from, limit or impair the constitutional functions that are given to the Houses of Congress, respectively, for the purpose of enforcing obedience to the lawful orders of the Houses and for the purpose of preserving order, &c., by means of the exercise of the power to punish for contempt.

Of course this does not mean that Congress possesses no power to *define*, in doubtful classes, what shall be regarded as contempt of the *Courts*. It only means that whatever is by statutes or by universal principles of the parliamentary law contempt cannot be taken from the respective Houses by any authority.

This being, as seems to us, incontestably established, it becomes necessary next to inquire whether Section 104 of the Revised Statutes contemplates and intends to surrender to the authorities of the Criminal Court in this District the sole and exclusive jurisdiction and power to punish for contempt in those cases which said Section 104 requires to be certified to the District Attorney for this District; or whether said section, if fully executed according to its plain requirements, must and does operate as a surrender of the power of the respective Houses themselves to punish as contempts the acts so required to be certified to the District Attorney.

It is, we submit, demonstrated by the considerations and authorities which we have above cited that any statute which cannot be *fully* executed, according to its terms, without interfering with, restricting or impairing the power of the Houses respectively, freely, promptly, and at all times, and under all circumstances, to exercise the respective constitutional functions given them in order to preserve order, and to enforce obedience by summary infliction or punishment for contempt, cannot be a valid law.

It cannot be a valid law, because its full enforcement does, of necessity, involve either a full, or at least a partial, surrender of the inalienable power of the Houses to punish for contempt in that given case where such full enforcement of such statute renders the punishment by the Houses respectively impossible.

This proposition is as plain and as incapable of being successfully controverted as is any that can be stated or conceived. But it is equally plain that the full execution of the provisions of Section 102, under which these indictments are framed, and of said Section 104, does contemplate and does require the *immediate and full* surrender of the alleged delinquent, so refusing to answer questions, to a wholly distinct and independent jurisdiction and custody, to wit, to the Criminal Court of the District of Columbia—a custody with which the Houses of Congress *cannot interfere*—a custody which may continue for indefinite years, and cannot continue less than a month in case of conviction—a custody which Section 104 *invites and urges* the said Court and its Grand Jury to *immediately* take and to retain until the end of the imprisonment for which Section 102 provides, and which, as we have just stated, may continue for years.

It is surely apparent from the very face and express terms of Sections 102 and 104 that they do not contemplate or permit, in a case where they require a delinquent to be certified to the District Attorney, that such certification shall be delayed until the House has punished the delinquent for his refusal to answer, and then require such certification *after* such infliction of punishment by the House.

On the contrary, it manifestly contemplates and requires the substitution of the punishment provided for in Section 102 in lieu and place of any which the House might otherwise inflict. And so it has been held by the Supreme Court of this District. We cite the following on this point from note 3, page 164, of Cooley's Constitutional Limitations (4th Ed.), where the author

says, in regard to what are now Sections 102 and 104 of the Revised Statutes, as follows:

"In the matter of Kilbourn, May, 1876, Chief-"Justice CARTTER, of the Supreme Court of the Dis-"trict of Columbia, discharged on *habeas corpus* "a person committed by the House of Repre-"sentatives for a contempt in refusing to testify, "holding that, as the refusal was an indictable "offense by statute, a trial therefor must be in the "courts and not elsewhere. If this is correct, the "necessities of legislation will require a repeal of the "statute; for if, in political cases, the question of pun-"ishment for failure to give information must be left "to a jury, few convictions are to be expected, and no "wholesome fear of the consequences of refusal."

We submit that, so far as relates to the point that these sections *intend* to delegate to the Criminal Court of this District the *exclusive* jurisdiction and power to punish as contempt the acts denounced in Section 102 of the Revised Statutes, and to deprive the Houses of Congress of their constitutional functions in that particular class of cases, this decision of Chief-Justice CARTER here cited was and is right; and we further submit, in regard to this extract from Cooley, that the distinguished author is right in his intimation, there expressed, that such attempted delegation and transfer is unconstitutional and void; or, if he does not intimate that much, he does expressly aver that the law, because of its pernicious character, must be repealed.

Now, it is as evident as is the axiom that a body cannot occupy different spaces at the same time, that Sections 102 and 104 cannot be executed at all, and yet the Houses retain and exercise the right and power, or the possibility, of punishing the delinquent for contempt during the execution of the said provisions of Sections 102 and 104.

Please observe that punishments for contempt are always *summary*—always required to be administered promptly, on the commission of the offense, and always

require the personal presence of the accused in being tried and punished. How is it possible that this state of things can co-exist along with that immediate prosecution so peremptorily and explicitly *ordered* by Sections 102 and 104?

No; most palpably the fact is, as already remarked, that these sections contemplate and admit of no such double prosecution. They contemplate and admit of but *one* prosecution in the cases covered by said two sections, and that prosecution must be in the Criminal Court of this District. These sections, therefore, involve and require the surrender, in the class of cases where said certificate to the District Attorney is required, of the power of the House so certifying to punish as contempt the particular act so certified; and they require the delegation of this part of the constitutional jurisdiction of the Houses, respectively, to punish for contempt, to the Criminal Court of this District.

In this connection it is proper to direct the attention of the Court to the fact that, although this statute, approved the 24th of January, 1857, has now been on the statute books for nearly forty years, no case has ever been prosecuted, and but one indictment found under it, in which the prosecution was in effect abandoned.

Should it be urged in reply to what we have said regarding the constitutionality of Sections 102 and 104, taken as a whole, that the Courts will never give to a statute a meaning which renders it unconstitutional if it is capable of being construed in such a way as to effectuate the intention of the Legislature and yet have a constitutional meaning, our reply to such a position is as follows:

The principle that a constitutional sense will always be given to a statute instead of an unconstitutional one, when it admits of such constitutional sense, is subject to the qualification which, in Section 180 of Endlich on Statutes, is stated in these words:

"But the rule above stated does not warrant the avoid-
" ance of unconstitutionality of a statute by forcing upon
" its language under construction a meaning which, upon
" a fair test, is repugnant to its terms" (citing *French vs. Teschemaker*, 24 Cal., 518; *People vs. Railroad Co.*, 35 Cal., 605; *Bigelow vs. Railroad Co.*, 27 Wis., 478; *Bishop W. R. L.*, Sec. 90.) "Where the language will not
" fairly bear a construction consistent with the Constitu-
" tion, the Courts can only refuse to enforce the act."

Citing *Attorney General vs. Eau Claire*, 37 Wis., 400.

Precisely the same principle we find stated in the case of *Sprague vs. Thompson* (118 U. S., 90-4-5). In the syllabus it is stated thus:

"If a clause in a statute which violates the Constitu-
" tion cannot be rejected without causing the act to
" enact what the legislature never intended, *the whole*
" *statute must fail.*"

In that case the Courts of Georgia had undertaken to sever the provisions of Section 1512 of the Code, regarding the pilotage of coasting vessels, so as to enforce the part that did not conflict with the Constitution and laws of the United States, and to let the rest of the section perish. Justice MATTHEWS, in the opinion, in objection to this decision, says (bot. p. 423):

"But the insuperable difficulty with the application
" of that principle of construction to the present in-
" stance is that by rejecting the exceptions intended by
" the Legislature of Georgia, the statute is made to
" enact what confessedly the Legislature never meant.
" It confers upon the statute a positive operation be-
" yond the legislative intent, and beyond what any one
" can say it would have enacted in view of the illegality
" of the exceptions. We are therefore constrained to
" hold that the provisions of Section 1512 of the Code
" of Georgia cannot be construed so as to reject the
" unconstitutional exceptions merely, and that the

" whole section must be treated as annulled and " abrogated by Section 4237 of the Revised Statutes."

And see, also, *U. S. vs. Reese*, 92 U. S., 120 U. S., and cases cited.

This, therefore, is the law in regard to the right to resort to a constitutional interpretation of a statute where the text of the statute apparently conflicts with the Constitution. The only possible interpretation of these two sections, 102 and 104, which divests them of their apparent assignment, to the Criminal Court of this District, of the power of the Houses to punish for contempt, is to say that the sections may be construed to mean that the certification to the District Attorney may be delayed until after the House has punished the same act for contempt—that the statute does not say *when* the certification to the District Attorney shall occur, and may therefore very well be construed as intending to postpone such certification until after the House has punished for contempt.

We have already seen that it is impossible to hold that the intention of the law was to *first* have the accused certified to the District Attorney, and the House *afterwards* take up the matter of punishing as contempt for the same refusal. This is impossible, because after, by means of the certificate, the custody of the accused is surrendered to the District Attorney the Houses of Congress cannot interfere with that custody, and therefore cannot submit the accused to punishment for contempt after certification to the District Attorney.

We are therefore brought to the single question: Will it be in conformity with the intention of these sections to give them the meaning that the certificate shall not or need not be made until after the House has punished the refusal as a contempt? We submit that giving this statute such a construction is plainly to defeat its intention; and this, as held in the case just cited of *Sprague vs. Thompson (supra)*, is not per-

missible in order to avoid the unconstitutionality of the statute.

Section 104 says:

"*Whenever* a witness summoned as above mentioned "in Section 102 fails to testify, *and the facts are reported* "*to either House*, the President of the Senate, or the "Speaker of the House, as the case may be, *shall* cer- "tify the fact, under the seal of the Senate or House, "to the District Attorney for the District of Columbia, "whose duty it shall be to bring the matter before the "Grand Jury for their action."

This section, in express words, enacts that "*whenever*" a witness, summoned to testify, fails to answer, *and the facts are reported to the House, then* the presiding officer shall certify the matter to the District Attorney. These words, taken together, show two things, namely:

1. That there can be no punishment for contempt prior to the time pointed to by this word "whenever," because it is impossible that the delinquent can be punished by the House for contempt *prior to any report* of his refusal to that House.

Therefore, the statute, by this provision, requires the certification to the District Attorney to be made "whenever" the *first* report of the failure to answer is made to the House. This excludes every possibility of there having been, *prior to the report here spoken of*, any punishment for contempt, because there can be no punishment by the House prior to said report of the delinquency to the House.

2. The other thing shown by these words is that, *as soon as* there has been a refusal to testify *and* a report of the facts to the House, *then* the certificate to the Prosecuting Attorney of the District is to be made, and the custody of the derelict is thereby surrendered to the Criminal Court.

The meaning, according to all the dictionaries, and according to the universal popular signification of that word, of the word "whenever," is "at whatever time."

The requirement of the statnte, therefore, as to the *time* of certification, is the same as if it had said, " when a refusal occurs, and a report of such refusal is " made to the House by the committee, *then, and im-* " *mediately thereupon*, the certificate to the District " Attorney shall be made."

Hence, it is impossible, without defeating the intention of the Legislature, as expressed in said sections 102 and 104, to hold that these sections *retain* in the House making the certificate, the power to punish for the alleged contempt, notwithstanding, *and after*, the making of said certificate. These sections are, therefore, void as incapable of any operation except that of operating to defeat the constitutional provision which endows the House of Congress with the *inalienable power* to punish for contempt whatever acts amount to a contempt of the authority of the House.

III.

Limitations, in the Courts, on power to enforce disclosure of private affairs.

We shall now state a set of propositions, generally without any extended elaboration, each of which we hope to thoroughly fortify by reason and authority, and which lead to the conclusion that the committee was without jurisdiction to ask the questions which the accused declined to answer.

We commence with the following proposition, which we take from the second paragraph of the syllabus of the case *In re Pacific Railway Commission* (32 Fed. Rep., 241):

" Congress cannot compel the production of *private* " *books and papers* of citizens for its inspection, except " in the course of judicial proceedings, or in suits in-

" stituted for that purpose; *and then only upon aver-*
" *ments that its rights in some way are dependent upon*
" *evidence therein contained.*"

On page 250, in the opinion by Justice FIELD, this is repeated in these words:

" In the pursuit of knowledge it " (the commission)
" cannot compel the production of private books and
" papers of citizens for its inspection, except in the
" progress of judicial proceedings, or in suits instituted
" for that purpose, *and in both cases only upon aver-*
" *ments that its rights are in some way dependent for en-*
" *forcement upon the evidence of those books and*
" *papers.*

" Of all the rights of a citizen few are of greater im-
" portance or more essential to his peace and happiness
" than the right of personal security; that involves not
" merely protection of his person from assault, but ex-
" emption of his *private affairs*, books and papers from
" the inspection and scrutiny of others. Without this
" right all others would lose half their value."

And see as to judicial character of such a proceeding *Interstate Commerce Commission vs. Brimson*, 154 U. S., 485; *Whitcomb's Case*, 120 Mass., 118.

This statement, regarding when the courts will compel an unwilling defendant to exhibit to his adversary, or to others, his private papers, is based upon the principles of equity, established in this country and in England, from time immemorial, and this element of our law has been embodied in the statutes of 14th and 15th Victoria *(4 Jacobs & Fisher's Dig., 4845)*, and other later English statutes; and also in the statutes of the United States, such as Sections 724 and 689 of the Revised Statutes, and others. When Justice FIELD here says that " in each of these classes of cases the
" production of books and papers can only be ordered
" upon averments that the applicant's rights are in
" some way dependent for enforcement upon the evi-
" dence of these books and papers," his statement falls

far short of stating the strictness with which the law surrounds and protects such private books and papers.

Under Section 869 of the Revised Statutes, if the production of papers and documents is demanded, the application must be accompanied by an affidavit of the party applying, showing that the document is in the possession of the witness, and that the same, if produced, would be *competent and material* evidence.

In stating these requirements under the English and American equity jurisprudence, Story's Equity Pleading (10th edition), in Section 318, speaking of what a bill of discovery must show in order to get at such documents, says that it must show that the plaintiff *has a title and interest, what* that title and interest *is* in the subject matter respecting which discovery is sought; that the applicant is *not a stranger* to that title; and that the title is not a contingent or future, but a present and vested one. It must also show, not only the plaintiff's interest in the subject matter, and that he is entitled to call for the documents, but it must state a case which will constitute a ground for a suit or defense at law; the object of the Court in compelling discovery being to enable some *other* Court to decide on matters in dispute between the parties, the discovery of which is material. If the bill does not show such a case as renders the discovery material to support or defend the suit *it is plainly not a case for the interposition of the Court.* Unless all these, and other like features, are shown, *the bill is demurrable, and, on demurrer, will be dismissed* (see the cases cited in Notes 2 and 3 to Section 318, and Notes 5 and 6 and note *a* to Section 319 of Story's Equity Pleading).

The above-named statutes of 14 and 15 Victoria are, in substance, the same as our Section 724 of the Revised Statutes, and which last-named section permits the party calling for the papers to enforce their production *only* when, "by the ordi-"nary rules of proceeding in chancery," such production is enforceable. We have just stated from

Sections 318 and 319 of Story's Equity Pleadings, and the cases in the notes, under what circumstances such enforced production is compelled "by the "ordinary rules of proceeding in chancery."

In the case of *McIntyre vs. Mancius* (3 Johnson's Chy., 45-7), decided in 1817, the Court stated the ground upon which it refused to allow any order for the production of books, &c. The Chancellor based such refusal upon the ground that no sufficient equity was set forth in the bill, in that the nature of the defense at law was not stated. "For anything," said the Court, "that appears on the bill, the discovery called "for may be utterly useless or frivolous, or it may be "to enable the defendants at law to convict the plaint-"iffs of a crime, or to subject them to a forfeiture." "It is not," said the Court, "improbable that the de-"fense at law is usury, and then the assistance of this "Court would be obtained without a previous offer to "do the defendants justice by paying the sum equi-"tably due." (And see *Wilson vs. Wabber*, 2 Gray, 558, and authorities there cited.)

These principles run through the entire body of the cases in the American and English Courts. They exclude parties from any right to the production of papers in the Courts unless they show, definitively, that they have a case, what that case is like, wherein and how the papers demanded will tend to throw light on the case; that that light is material to the case of the party applying, and that the discovery is not sought for the purpose of bringing the party required to produce these papers into contempt or disgrace, or to criminate him, or the like.

Such, incontrovertibly, is the care and jealousy with which, *in all Courts in England and the United States*, the citizen is protected against being unreasonably or unnecessarily required to disclose his "private affairs," whether by the production of documents or by giving testimony exposing such private affairs (see 103 U.

S., near bottom of page 190; also, 32 Federal Reporter, near bottom of p. 251).

We shall come presently *and more directly* to the vital question in this case; namely, whether the law has thus solicitously and scrupulously protected against unnecessary invasion the private papers and affairs of every citizen, even where the proceeding is *one being conducted under the care and scrutiny of the courts of justice*, and notwithstanding this, and at the same time, has left open to unlimited and ruthless invasion *all* the private affairs of *every* citizen when called upon to testify before some legislative body or committee.

IV.

Restraints upon the Courts, created by the Fourth and Fifth Amendments to the Constitution, protective of private rights and liberties, are equally applicable to proceedings in legislative bodies.

The proposition stated in the foregoing head lines is, in principle and reason, self-evident. To impose the restraints, created by said amendments to the Constitution, upon the Courts, which are the most enlightened, the most conservative, and the most highly-educated tribunals known to our law, and which from long before the origin of our Government, and ever since, have been and are universally regarded as the safest repositories of the liberties and rights of the citizen, and at the same time to leave them to be disregarded by the legislative bodies, and the committees thereof, and to place all private property and private and domestic rights and affairs at the mercy of any and every member of such committee, however ignorant and regardless

of such rights he may be, and however wild and furious in his pursuit of the knowledge of the private and domestic affairs of his neighbors or his enemies he may be, would be simply madness.

The absurdity of such a view is so extreme as to exclude it from the possibility of having been intended by the Constitution or our system of laws. But there is abundant authority touching these restraints on legislative bodies. *Emery's Case* (107 Mass., 172), upon this particular subject, is the leading case in the United States, and, so far as we can find, has been without a single exception approved in the courts of the United States, and of these States, whenever the matters embraced by it became involved.

In this *Case* (at pp. 182–3) the court comes to our direct question, namely, whether legislative bodies and committees are, like the courts, subject to all the requirements protective of private rights, to which the law subjects the courts, and it answers the question in these most emphatic words:

"*No one will contend, of course, that the legislature* "*is not limited in its powers by the provisions of the* "*Constitution, equally with all other departments of the* "*Government* and the whole body of the Common- "wealth, whether undertaken to be exercised *in the* "*ordinary form of laws enacted, or by those orders and* "*requirements which are incidental to its functions and* "*are adopted as a means of their performance.* There "is nothing in the terms of the article in question to "*except legislative* bodies from its operation. *The* "*nature and purpose of the provisions are equally* "*applicable to investigations conducted by the legislature* "*itself, or by one of its branches, or by a committee of* "*its own members, as when conducted before the courts,* "*or by commissioners, or other tribunals established by* "*law. Such tribunals can in no case disregard this* "*rule of protection. The legislature cannot, by the most* "*formal and solemn enactments of law, authorize them* "*to do it. If, then, the legislature cannot, by the formal*

" *enactment of all its branches, subject a citizen to such* " *compulsory disclosure, it is difficult to see on what* " *ground of argument or inference, from necessity,* " *propriety, or the nature of constitutional republican* " *government, an authority can be deduced for either* " *branch of the legislature to do so by its mere order.*"

It would be impossible for us to impress upon the attention of the Court too earnestly the consequences and importance to the case at bar of the fact that this Court has carefully reviewed this case of Emery, and has affirmed and approved it fully and with much emphasis, so far as relates to the doctrines which we here quote from it :

In Note 3, page 164, of Cooley's Constitutionat Limitations (4th Ed.), the author says : " But the privilege " of the witness is to be exempt from a compulsory dis- " closure of his own criminal conduct is the same when " examined in a legislative body or committee as when " sworn in court *(Emery's Case*, 107 Mass., 172*).*" Then, again, the same author, in Note 1, page 384, says : " A legislative body has no more right than a " court to make its examination of parties or witnesses " inquisitorial *(Emery's Case*, 107 Mass., 172.*)*"

These doctrines are reasserted in the case of *Cullen vs. Commonwealth*, 24 Grat., 624, and also in the case of *United States vs. James*, 60 Fed. Rep., 261.

It may be asked in this connection how it can be possible to apply to a legislative investigation the rules which we quote from Sections 318 and 319 of Story's Equity Pleadings, since those rules are applicable to actual " cases " in the courts, whereas committees of investigation ordinarily have no " case " before them as such, and, therefore, cannot apply rules to their investigations which, in their nature, can only be applied to cases in court. And, further, that such a limitation on committee investigations as courts apply to bills of discovery, and the like, would render impracticable any valuable investigation.

This question is appropriate enough, but the replies to it are extremely plain and obvious.

(a) One reply is that the Fourth Amendment to the Constitution, which prohibits unreasonable searches and seizures, and the equivalent " maxim of the com- " mon law which secures to the citizen immunity in " his home against the prying eyes of the Government " and protection in person, property and papers against " even the processes of the law, except in a few " specified cases," and which maxim is that " every " man's home is his castle," and which prohibits " unreasonable searches and seizures " (see *Cooley's Const. Lim., s. p. 299, t. p. 369, 4th edition*), are exceedingly plain, unambiguous and peremptory commands of the fundamental law, and cannot be misunderstood or disregarded either by courts or by legislatures or the committees thereof.

Hence an investigation that proposes to pry into the private affairs of the citizen, in cases falling within said maxim and amendments to the Constitution, is to be, and must be, defeated so far as it attempts to invade such private rights. It may not always be " convenient " for adventurers, and others of aggressive tendencies, to observe these fundamental provisions of the Constitution, but arguments based on such inconvenience, when urged in favor of violating plain law, are always contemptuously swept from the presence of the courts and all other just tribunals when so urged.

(b) Another reply is that it is a mistake to say that the enforcement by committees of legislative bodies of the Fourth Amendment would materially tend to defeat legitimate legislative action or investigation. In nine hundred and ninety-nine cases out of a thousand witnesses are ready to answer all pertinent and respectful questions; and, hence, the observance of the protections furnished by said Fourth Amendment would not

interfere in more than one case in a thousand with full and free investigation.

(c) Still another reply is that, in investigations looking to the enforcement of those classes of powers pertaining to the Houses of Congress, respectively, and commonly denominated their judicial powers, which are set out in the first paragraph of the headnotes to the *Kilbourn-Thompson* case (103 U. S., 168), the committee *does have* before it a "case" to which all the rules applied in the courts protective of private rights and affairs are most readily applicable.

(d) But, if it is to be held that the right to compel disclosures of the private affairs of citizens applies to an investigation resorted to avowedly in aid of the *legislative functions* of Congress, even then there is, practically, no difficulty in applying the rules protective of the citizen's privacy, because, in such cases, the resolution creating the authority of the committee can readily state what the aim of the investigation is; that it is one which justifies exposure of such private affairs, and what action, or what *kind* of action, is expected to be based upon the results thereof.

And, in case the Record does, in advance, disclose the aim or object for which the investigation is instituted, it can then be seen whether the question asked has any pertinency in aid of the judicial or the legistive action "avowed" by the authority given to the committee. When the record so discloses the Congressional action contemplated, and the information needed in regard thereto, then the Government has placed before the witness a "case" in which the Government is concerned, and the pertinency of the evidence required of him is made plain in advance.

By what we here say regarding that which is not decided in the Kilbourn case—namely, the right to enforce disclosures of private affairs when needed in support of avowed *legislation*—we by no means concede

that private affairs can be dragged out from unwilling witnesses on a vague and shadowy contention or claim that the disclosures will aid some contemplated legislation. This we deny *toto celo*. But, *assuming* that in this we are wrong, still there is no difficulty in applying the rules, protective of citizens against unreasonable searches and seizures, to legislative bodies.

We are authorized to make this denial of power in the Houses to compel inquiries into private affairs, and to punish as contempt a refusal to disclose such affairs, in any other class of cases than those in which the Constitution bestows upon the Houses, respectively, special and express judicial powers, such as those enumerated in paragraph 1 of the syllabus in the Kilbourn case, not merely by a just interpretation of the decision in the Kilbourn case, but also by what is stated in regard to the doctrines of that decision by the highest authority.

For example, in 2 Hare on the Constitution (top p. 855), that author, speaking of the doctrine of the Kilbourn decision, says :

" This doctrine may be regarded as *established* that " the legislatures of the States are under the same dis- " ability as Congress, and cannot, consistently with the " Fourteenth Amendment, compel the attendance or " production of witnesses or papers in *any matter which* " *affects private rights*, although the Government is " also a party in interest."

Then, again, in the recent posthumous work of the late Justice MILLER, the author of the opinion in the Kilbourn case, and which work embraces ten of his carefully written and revised lectures on the Constitution, delivered before a law school of this District (edited by J. C. Bancroft Davis), is found a careful review and compact statement of what was decided in the case of *Kilbourn vs. Thompson*. It is an opinion in which Justice MILLER took some justifiable pride, and which he says has had the effect of reversing and correcting the practice regarding the invasion of pri-

vate rights by committees throughout the States of this Union. After stating generally the character and doctrines of the Kilbourn case, Justice MILLER sums up the entire effect and substance of that decision, so far as it relates to the vital question in the present case—to wit, the right of legislatures and their committees, and the Houses of Congress, to pry into the private affairs of citizens and to compel the disclosure thereof by giving testimony or producing papers—in the following unmistakable terms, found at page 415 of said work, and speaking of what was held in the Kilbourn case :

"It was held that neither House had any right to "organize an investigation into the private affairs of a "citizen, and, except in a case in which the Constitu- "tion *expressly* conferred upon one body or the other "powers *which were in their nature judicial*, and which "*required* an examination of witnesses, they possessed "no power to compel by fine or imprisonment, or both, "the attendance of such witnesses and answers to "interrogatories which did not relate to some question "of which it had jurisdiction."

Here, then, is an authoritative statement coming from the author of the opinion in the Kilbourn case, asserting, in so many words, that neither of the Houses had power to compel the disclosure of private affairs by witnesses subpœnaed before a committee "except "in a case in which the Constitution expressly con- "ferred upon one or the other powers which were in "their nature judicial," and which judicial powers required the examination of witnesses.

V.

Contempt proceeding must take on the definiteness of judicial prosecution.

Our next proposition is closely kindred to our first, and is that, when a Legislature is proceedingin a prosecution for contempt, it must give to its proceedings the definiteness and other characteristics of a judicial prosecution, in a court, for a crime.

Contempt of Court, or any other body that is empowered to punish for contempt, is a specific *criminal offense*. This is expressly decided in *New Orleans vs. Steamship Co.* (20 Wall., 387, 392). See, also,

Hayes vs. Fisher, 102 U. S., 122.
Ex parte Kearney, 7 Wheaton, 39.
Coggin vs. Boies, 34 Fed. Rep., 699.

A contempt proceeding in a court or legislature, being a proceeding distinct from the body of the case as to which the contempt may have been committed, and being an *independent* and a *criminal* proceeding, there must be applied to it the legal requirement applicable to all criminal proceedings; to wit, that every accusation must be definitely, distinctly and affirmatively set forth in the record and must be established by the evidence, and this especially in courts of limited jurisdiction.

Nothing can be conceived more abhorrent to the principles of our law than the idea that a party may be prosecuted for contempt without being permitted to know the grounds upon which the Court claims the right to punish him, or the grounds upon which it bases its right *to demand the disclosure of his private affairs.*

That the court prosecuting him shall be *presumed* to have good and sufficient reasons for demanding that to be done, the non-doing of which constitutes the alleged contempt, is a position at war with all just law and

shocking to the very instincts of civil liberty. And yet it will appear, as we proceed in this discussion, that it was precisely on this ground, to wit, that it will be *presumed, without averments so alleging*, that the Senators, in asking said questions, had good and, in law, sufficient reasons for asking them; and had such as brought the questions within the jurisdiction of the Senate that the trial Court and the Court of Appeals of the District of Columbia based their decision against the defendants.

We now turn to some of the authorities more distinctly and exactly in refutation of said last-named position of said courts.

In what we have stated above from the said case *In re Pacific Railway Commission* (32 Fed. Rep., 250), asserting that "in the pursuit of knowledge, it [the "commission] cannot compel the production of private "books and papers [and, of course, not the exposure of "the private business and affairs of the citizen, p. 251], "except in the progress of judicial proceedings, or in "suits instituted for that purpose, and in *both* cases "only upon averments that its rights are, in some way, "*dependent*, for enforcement, upon the evidence those "books and papers contain," it results that every prosecution for contempt is not only a criminal prosecution, but it is one that can only be prosecuted in a court, or in a body, such as a legislative body, having to a limited extent the powers of a court *(see 103 U. S., bottom of page 197)*.

This principle being kept in mind, we turn to a preliminary statement which becomes here appropriate, namely, that the Senate is, in the exercise of its powers to punish for contempt, *a court*, but one of "very limited" and special jurisdiction.

Indeed, it is thoroughly settled that *all* the courts of the United States are courts of *limited and special* jurisdiction, and proceedings in such courts must disclose, on the face of the pleadings, the facts necessary

to constitute jurisdiction (*Kemp's Lessee vs. Kennedy*, 5 Cranch, 173).

But it is not merely in this sense so applicable to all courts of the United States, as between the jurisdiction of such Courts and the jurisdiction of the State Courts, that we here appeal. It is to the altogether more conclusive fact that the Senate, in matters judicial, is a Court of the *very* limited, restricted and special jurisdiction, and that, in order to show its proceedings to be within its jurisdiction, *every* fact necessary to show that the case, being prosecuted, belongs to one of these special and limited classes, must appear.

This is most obviously so upon the general principles applicable to such matters, and really hardly n eds discussion. Yet it has been the subject of the most careful discussion. In the case of *Kilbourn vs. Thompson* (103 U. S., 168), in the fourth paragraph of the syllabus, this is most distinctly announced in these words :

" Neither House of Congress was *constituted a part* " *of any Court of general jurisdiction*, nor has it any " history to which the exercise of *such* power can be " traced. Its power must be sought alone in some ex- " press grant in the Constitution, or be found necessary " to carry into effect such powers as are there granted."

At the bottom of page 181, when the Court comes to this point, its language is :

" Conceding for the sake of argument that there are " cases in which one of the two bodies that constitute " the Congress of the United States may punish for " contempt of its authority, or disregard of its orders, " it will scarcely be *contended by the most ardent* advo- " cate of their power, in that respect, that it is *un-* " *limited.*"

Then, after quoting the provision of the Constitution which reserves all non-granted powers to the States and the people, the Court says :

" No *general* power of inflicting punishment by the " Congress of the United States is found in that in-

" strument. It contains in the provision that no 'per-
" 'son shall be deprived of life, liberty or property
" 'without due process of law' the *strongest* implica-
" tion against punishment by order of the legislative
" body. It has been repeatedly decided by this Court,
" and by others of the highest authority, that this
" means a trial in which the rights of the party shall
" be decided by a tribunal appointed by law, which
" tribunal is to be governed by rules of law previously
" established. An act of Congress which proposed to
" adjudge a man guilty of a crime and inflict the pun-
" ishment would be conceded by all thinking men to
" be unauthorized by anything in the Constitution."

At the bottom of page 189 the Court repeats that it does not find it necessary to decide, in the present case, whether Congress can punish one for contempt in failing to answer questions shown to be needed to aid in *legislation*, and, near the bottom of page 190, says :

" Whether the power of punishment in either House
" goes beyond *this* or not " (that is, beyond the enforcement of the judicial powers named in paragraph 1 of the headnotes), " *we are sure that no person can be*
" *punished for contumacy as a witness before either*
" *House unless his testimony is required in a matter into*
" *which that House has jurisdiction to inquire ; and we*
" *feel equally sure that neither of these bodies possesses the*
" *general power of making inquiry into the private af-*
" *fairs of the citizen.*"

The Court then proceeds to state the dividing line between the powers entrusted to the three departments of the Government—to wit, the legislative, judicial and executive. Again and again, throughout the opinion, the Court breaks forth in the inquiry (as, for example, on page 195) :
" What authority has the House to enter upon
" this investigation into the *private affairs* of individuals
" who hold no office under the Government ? " On page 197, near the bottom, the Court says :

" But we do not concede that the Houses of Congress " possess this *general* power of punishing for contempt. " The cases in which they can do this are *very* limited, " as we have already attempted to show. If they are " proceeding in a matter beyond their legitimate cog- " nizance, we are of opinion that this can be shown, " and we cannot give our assent to the principle that, " by the mere act of *asserting* a person to be guilty of " contempt, they thereby establish their right to fine " and imprison him beyond the power of any court or " other tribunal whatsoever to inquire into the grounds " on which the order was made. This necessarily grows " out of the nature of *an authority which can only exist* " *in a limited class of cases, or under special circum-* " *stances;* otherwise, the limitation is unavailing and " the power omnipotent. The tendency of modern " decisions everywhere is to the doctrine that the juris- " diction of a Court or other tribunal to render a judg- " ment affecting individual rights is always open to in- " quiry when the judgment is relied on in any other " proceeding."

The Court cites—

Williamson vs. Berry, 8 How., 495.
Thompson vs. Whitman, 18 Wall., 457.
Knowles vs. Gas Light & Coke Co., 19 Wall., 58.
Pennoyer vs. Neff, 95 U. S., 714.

This principle, that " the cases in which they " (the Housrs of Congress) " possess this power of punishing " for contempt are *very limited*," being fixed in the case at bar—as it assuredly is, if by authority or reason anything can be fixed in this case—we turn to the question whether, in deciding upon the jurisdiction of the Senate, a court of very limited jurisdiction, the record must *affirmatively* show all the facts necessary to create its jurisdiction so to adjudge; and whether any of these facts will, as the Court below held, be *presumed*, in the total absence of averment to that effect.

In 12 American and English Encyclopædia of Law (p. 274) is a statement of our present proposition, and a citation of authorities, as follows:

"Note 2. The facts which must be shown to exist "before the matter can be within the jurisdiction of an "inferior court, and which can be inquired into collaterally, are such as, in the absence of which, the Court "cannot rightfully hear and determine any question "touching the matter in controversy (*Staninan vs. "Davis*, 1 Salk., 404; *Kempe's Lessee vs. Kennedy*, 1 "Pet., 30; *Commissioners vs. Thompson*, 26 Ala., 568; "*State vs. Ely*, 43 Ala., 568; *Hall vs. Howd*, 10 Conn., "514; *Proctor vs. State*, 5 Harr., Del., 387; *Gray vs. "McNeal*, 12 Ga., 424; *Chicago vs. Rock Island Railroad*, 20 Ill., 286; *Commissioners vs. Markle*, 46 Ind., "96; *Gay vs. Lloyd*, 1 G. Green, Iowa, 78; *Wight vs. "Warner*, 1 Doug., Mich., 384; *State vs. Metzgar*, 26 "Mo., 65; *Bergen Turnpike Co. vs. State*, 1 Dutch., N. "J., 554; *People vs. Koeber*, 7 Hill, N. Y., 39; *Clyde*, "*&c., Plank Road Co. vs. Parker*, 22 Barb., N. Y., "323; *Norwegian Street*, 81 Pa. St., 349; *Barrett vs. "Crane*, 16 Vt., 246)."

The same thing is expressly held in the recent case of *Runkle vs. United States* (122 U. S., 555). The following extract from the opinion of the Court by the Chief Justice in that case is conclusive:

"A court-martial, organized under the laws of the "United States, is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the "object of its creation has been accomplished it is dissolved (3 *Greenl. Ev.*, Sec. 470; *Brooks vs. Adams*, "11 Pick., 441, 442; *Mills vs. Martin*, 19 Johns., 7, "30; *Duffield vs. Smith*, 3 S. & R., 590, 599). Such, "also, is the effect of the decision of this Court in "*Wise vs. Withers*, 3 Cranch, 331, which, according to "the interpretation given to it by Chief-Justice MARSHALL in *Ex Parte Watkins*, 3 Pet., 193, 207, ranked "a court-martial as one of those inferior courts

"of limited jurisdiction whose judgments may "be questioned collaterally. To give effect to "its sentences it must appear affirmatively "and unequivocally that the Court was legally "constituted; that it had jurisdiction; that all the "statutory regulations governing its proceedings had "been complied with, and that its sentence was con- "formable to law (*Dymes vs. Hoover*, 20 How., 65, 80; "*Mills vs. Martin*, 19 Johns., 33). *There are no pre-* "*sumptions in its favor so far as these matters are con-* "*cerned.* As to them, the rule announced by Chief- "Justice MARSHALL in *Brown vs. Keen*, 8 Pet., 112, 115, "in respect to averments of jurisdiction in the courts "of the United States, applies. His language is: "'*The decisions of this Court require that averment of* "'*jurisdiction shall be positive; that the declaration* "'*shall state expressly the fact on which jurisdiction* "'*depends. It is not sufficient that jurisdiction may be* "'*inferred, argumentatively, from its averments. Their* "'*authority is statutory, and the statutes under which* "'*they proceed must be followed throughout. The* "'*facts necessary to show their jurisdiction and that* "'*their sentences were conformable to law, must be stated* "'*positively, and it is not enough that they may be in-* "'*ferred argumentatively.*'"

The same thing will be found in

2 Freeman on Judgments, Sec. 527, and cases cited.
Grignon's Lessee vs. Astor, 2 How., 319, 341.
Peacock vs. Bell, 1 Saund. (W'ms Ed.), 73-4.
Byrd vs. State, 1 How. (Miss.), 163, 173.
Harvey vs. Tyler, 2 Wall., 340.
Cooley Const. Lim., 4 Ed., 508-9, and Note.
1 Bishop Crim. Procedure, Note 3, Sec. 236.
1 Bishop on Crim. Procedure, Sec. 1169.

See, also, 10 Conn., 514; 127 Mass., 474; 89 Ind., 422; 67 Md., 250; 105 Mass, 23; 2 Gray, 115; 4 Metcalf, 421; 18 Vt., 594; 12 Vt., 431.

The substance of all these decisions, as applied to the case at bar, is obviously this: that since there is nothing in the resolution authorizing the committee to make the investigation, or elsewhere, going to show that the results of the investigation were needed or to be used by Congress, or either House thereof, in exercising the judicial functions named in the first paragraph of the syllabus in the case of *Kilbourn vs. Thompson*, or in framing and adopting legislation, and since, moreover, the private affairs of a citizen cannot be wrested from him and made bare to the public unless one or the other of these two needs or purposes exists in the case, and is "avowed" in the resolutions directing the investigation, and justifies the compulsory disclosure of these private affairs, and justifies punishment for contempt for persistent refusal to answer, and since the law is, as applied to a court of limited jurisdiction, like the Senate, that which is quoted by Chief-Justice WAITE from the opinion of Chief-Justice MARSHALL—namely, that "the decisions of this Court require that "averment of jurisdiction shall be positive; that the "declaration shall state expressly the fact on which "jurisdiction depends. It is not sufficient that juris-"diction *may be inferred argumentatively* from these "averments. * * * The facts necessary to show "their jurisdiction, and that their sentences were con-"formable to law, must be stated positively, and it is "not enough that they may be inferred argumenta-"tively"—therefore, the committee was wholly without power or jurisdiction to compel the disclosure of the private affairs of the citizen, as the indictment shows these defendants were required to disclose their private business.

Precisely here is the body and law of our case.

VI.

Reliance of the trial Court on the case of the People ex rel. McDonald vs. Keeler.

The decision of the Court of Appeals of New York in the case of *People ex rel. McDonald vs. Keeler* (99 N. Y., 463) is the one which the trial Court relied on in refusing to follow the doctrines of Chief-Justice MARSHALL and of this Court, as set forth in what we have above quoted from the Runkle case *(supra)*, holding that no presumptions in favor of jurisdiction can be indulged where the proceeding is a special one and in a court of special and limited jurisdiction.

The trial Court read, in support of its position that jurisdictional facts will be presumed in the absence of averment, the passage which is found at page 487 (99 N. Y.), and which reads as follows:

" We are bound to presume that the action of the " legislative body was with a legitimate object if it is " capable of being so construed, and we have no right " to assume the contrary was intended."

Let us now carefully look at the view taken by the trial Court in this case of what said Court admitted to be expressly decided, as appears by the face and letter of the decision in this New York case. The following is the language of the New York Court regarding the class of investigations in which it is there held, explicitly, that there exists no right to compel a witness to answer questions which he is protected by the general provisions of the law from answering (99 N. Y., 485):

" *An investigation, instituted for the mere sake of in-* " *vestigation, or for political purposes, not connected with* " *intended legislation, or with any of the other matters* " *upon which the House could act, but merely intended* " *to subject a party or body investigated to public anim-* " *adversion, or to vindicate him or it from unjust* " *aspersions, where the legislature had no power to put*

" *him or it on trial for the supposed offenses, and no* " *legislation was contemplated, but the proceeding must* " *necessarily end with the investigation*, WOULD NOT, IN " OUR JUDGMENT, BE A LEGISLATIVE PROCEEDING, OR GIVE " TO EITHER HOUSE JURISDICTION TO COMPEL THE ATTEND- " ANCE OF WITNESSES, OR PUNISH THEM FOR REFUSING TO " ATTEND."

Then, in the same case, the New York Court (p. 483 *et seq.*) holds what this Court, in the Kilbourn case, refused to decide; namely, that a witness could be punished for contempt for refusing to answer where the object of the investigation was to aid in pending or contemplated legislation.

Both of these classes of investigation are, in the case of Keeler, expressly and distinctly marked out as existing classes; in one of which answers could not be compelled where the witness was unwilling, and where no legislative action was to be based on the result of the investigation; and, in the other, that answers could be compelled where such action was contemplated.

Now, what the Court held as to these two classes was, that if the record was silent as to which class the one being prosecuted belonged to, it would be *presumed* that it belonged to the class where answers could be compelled, and the witness imprisoned for refusing to answer; that is, held that an essential jurisdictional fact not shown to exist by the record—namely, that legislative action was to be based on the result of the investigation—would be *presumed.*

The falsity of this position (aside from its flagrant defiance of all authority forbidding presumptions, in the absence of averment, in favor of crime) is seen in the fact that, having *assumed* that, in the absence from the record of any fact going to show that it belonged to that class in which answers could be eompelled and punishment for contempt inflicted, and did not belong to the class where this could *not* be done, the witness is *there-*

upon, and owing to this *presumption*, compelled to answer questions which he could not lawfully be required to answer if the investigation belonged to that class named in the above extract, and which class had been, for the purpose of compelling an answer, *presumed out of the case.*

What, then, after such compulsion, becomes of that part of the law here laid down by the Court, which holds that a witness ought not, and could not be compelled, to answer should the investigation *turn out* to belong to the other class; namely, the class where such legislative action is *not* contemplated, and where, therefore, punishment for contempt in not answering could not be inflicted ? Suppose it turns out afterwards, and at the end of things, that the investigation belongs to the class where no action, based on the investigation, was contemplated, and where, therefore, answers could not be compelled. The result would be that, when this is discovered, the innocent victim of a presumption would already have suffered the penalty of the law—this for not answering in a case where the law, as laid down even in this New York case, excuses him from making answer.

So far as we can see and understand, the conflicting positions attributed by the trial Court to the New York Court have no equivalent, in the way of absurdity, unless it be the ancient test by which witches were determined; namely, by throwing them into a horse-pond. If they did not succeed in rescuing themselves, and were drowned, then they were *not* witches, and were to go acquit of the charge, but go dead. If, however, they succeeded in escaping from the pond, then they were witches, and were executed. Under this decision it made no difference whether a witness was guilty or innocent, for, in either event, he was to be punished for contempt in failing to answer. And this is the position attributed by the Government to this decision of the Court of Appeals of New York.

Another absurdity involved in this decision is in assuming that guilt will be presumed in the absence of all averment going to charge guilt.

In what we have now stated going to show the absurdities involved in this New York decision, we not mean to say that they are all really there, but only that they are there according to what is attributed by the Government to the New York Court in that case. We are inclined to think that the New York Court saw, in that case, such conclusive and affirmative averment of the jurisdictional fact—to wit, that legislative action was intended to be based upon the report of the committee—as delivers the decision from such absurdities, and from indulging in presumptions of guilt. We also incline to think that the Court, in what it said about presumptions (and which in no view can be excused as not involving palpable error), based it upon what the Court has italicized in the resolution under which the New York committee acted *(p. 486)*; namely, *that the committee was required to report its recommendations concerning the same to the Senate.*

If this is equivalent to an affirmative and positive averment that legislative action was to be based upon the report of the committee (and it is not so equivalent—see Runkle's Case), then what the New York Court said about "presumptions" *was outside of the record*, and the decision of the Court, in that view, is delivered from most, if not all, of its absurdities.

VII.

Contrast of the Kilbourn resolution with the present one.

We now proceed to show, in another, and, in the main, distinct view, that it is impossible to hold that presump-

tions will be made in favor of the jurisdiction of the Senate in the case at bar, such as would create power and jurisdiction to ask the questions set forth in the indictments, answers to which were refused. We present this other view by laying before the Court condensed statements of what was decided in the case of *Kilbourn vs. Thompson* (103 U. S., 168), which shows that if the answers to the questions asked of Kilbourn could lawfully be refused, then, *a fortiori*, can these be refused in the case at bar without liability to punishment for such refusal.

The following syllabus of the report in *Kilbourn vs. Thompson* (103 U. S., 168) is by far the most compact and yet accurate synopsis of the entire decision which has come to our notice. It is as follows:

"1. K., for refusing to answer certain questions put " to him as a witness, by the House of Representatives " of the Congress of the United States, concerning the " business of a real estate partnership of which he was " a member, and to produce certain books and papers " in relation thereto, was, by an order of the House, " imprisoned for forty-five days in the common jail of " the District of Columbia. He brought suit to re- " cover damages therefor against the Sergeant-at-Arms, " who executed the order, and the members of the " committee who caused him to be brought before the " House, where he was adjudged to be in contempt of " its authority. *Held*, That although the House can " punish its own members for disorderly conduct, or " for failure to attend its sessions, and can decide cases " of contested elections, and determine the qualifica- " tions of its members, and exercise the sole power of " impeachment of officers of the Government, and may, " where the examination of witnesses is necessary to " the performance of these duties, fine or imprison a " contumacious witness, there is not found in the Con- " stitution of the United States any *general* power " vested in either House to punish for contempt.

"2. An examination of the history of the English "Parliament and the decisions of the English courts "shows that the power of the House of Commons, "under the laws and customs of Parliament, to punish "for contempt, rests upon principles peculiar to it, and "not upon any general rule applicable to all legislative "bodies.

"3. The Parliament of England, before its separation "into two bodies, since known as the House of Lords "and the House of Commons, was a high court of "judicature—the highest in the realm—possessed of "the general power incident to such a court, of pun- "ishing for contempt. On its separation the power "remained with each body, because each was con- "sidered to be a court of judicature and exercised the "functions of such a court.

"4. Neither House of Congress was constituted a "part of any court of *general* jurisdiction, nor has it "any history to which the exercise of such power can "be traced. Its power must be sought alone in some "express grant in the Constitution, or be found neces- "sary to carry into effect such powers as are there "granted.

"5. The Court, without affirming that such a power "can arise in any case other than those already speci- "fied, decides that it can exist in no case where the "House, attempting to exercise it, invokes its aid in a "matter to which its authority does not extend, such "as an inquiry into the private affairs of the citizen.

"6. The Constitution divides the powers of the Gov- "ernment which it establishes into the three depart- "ments—the executive, the legislative and the "judicial—and unlimited power is conferred on no "department or officer of the Government. It is essen- "tial to the successful working of the system that the "lines which separate those departments shall be "clearly defined and closely followed, and that neither "of them shall be permitted to encroach upon the "powers exclusively confided to the others.

" 7. That instrument has marked out in its three " primary articles the allotment of power to those de- " partments, and no judicial power, except that above " mentioned, is conferred on Congress or on either " branch of it. On the contrary, it declares that the " judicial power of the United States shall be vested " in one Supreme Court and such inferior courts as the " Congress may from time to time ordain and establish.

" 8. The resolution of the House, under which K. was " summoned and examined as a witness, directed its " committee to examine into the history and character of " what was called 'the real estate pool' of the District of " Columbia ; and the preamble recited, as the grounds " of the investigation, that Jay Cooke & Co., who were " debtors of the United States, and whose affairs were " then in litigation before a bankruptcy court, had an " interest in the pool or were creditors of it. The " subject matter of the investigation was judicial and " not legislative. It was then pending before the " proper Court and there existed no power in Congress " or in either House thereof, on the allegation that an " insolvent debtor of the United States was interested " in a private business partnership, to investigate the " affairs of that partnership, and, consequently, no " authority to compel a witness to testify on the " subject.

" 9. It follows that the order of the House declar- " ing K. guilty of contempt of its authority and or- " dering his imprisonment by the Sergeant-at-Arms is " void and affords the latter no protection in an action " by K. against him for false imprisonment.

" 10. *Anderson vs. Dunn* (6 Wheat., 204) commented " on and some of the reasoning of the opinion over- " ruled and rejected."

The following is a full copy of the resolution of the House in the Kilbourn case found at page 171 of 103 U. S., which reads as follows :

" *Whereas*, the Government of the United States is " a creditor of the firm of Jay Cooke & Co., now in

" bankruptcy by order and decree of the District Court " of the United States in and for the Eastern District " of Pennsylvania, resulting from the improvident de- " posits made by the Secretary of the Navy of the " United States with the London branch of said house " of Jay Cooke & Co. of the public moneys; *and*, " *whereas*, a matter known as the real-estate pool was " only partially inquired into by the late joint select " committee to inquire into the affairs of the District " of Columbia, in which Jay Cooke & Co. had a large " and valuable interest; *and*, *whereas*, Edwin M. Lewis, " trustee of the estate and effects of said firm of Jay " Cooke & Co., has recently made a settlement of the " interest of the estate of Jay Cooke & Co. with the " associates of said firm of Jay Cooke & Co., to the " disadvantage and loss, as it is alleged, of the numer- " ous creditors of said estate, including the Govern- " ment of the United States; *and*, *whereas*, the Courts " are now powerless by reason of said settlement to " afford adequate redress to said creditors—

" *Resolved*, That a special committee of five members " of this House, to be selected by the Speaker, be ap- " pointed to inquire into the *matter and history* of said " real-estate pool, and the character of said settlement, " with the amount of property involved in which Jay " Cooke & Co. were interested, and the amount paid, " or to be paid, in said settlement, with power to send " for persons and papers and report to this House."

We now add a full and exact copy of the Senate resolutions in the present case taken from the indictments, omitting only the innuendoes, which, of course, add nothing to the scope of the committee's authority. The resolution is in the following words :

" *Whereas*, it has been stated in the 'Sun,' a news- " paper published in New York, that bribes have been " offered to certain Senators to induce them to vote " against the pending tariff bill ; and

" *Whereas*, it has also been stated in a signed article " in the 'Press,' a newspaper published in Philadelphia,

" that the sugar schedule has been made up as it now
" stands in the proposed amendment in consideration
" of large sums of money paid for campaign purposes
" of the Democratic party ; *therefore*,

" *Resolved*, That a committee of five Senators be ap-
" pointed to investigate these charges, and to inquire
" further whether any contributions have been made
" by the Sugar Trust, or any person connected there-
" with, to any political party for campaign or election
" purposes, or to secure or defeat legislation, and
" whether any Senator has been, or is, speculating in
" what are known as sugar stocks during the considera-
" tion of the tariff bill now before the Senate, and with
" power to send for persons and papers, and to ad-
" minister oaths.

" *Resolved further*, That said committee be author-
" ized to investigate and report upon any charge or
" charges which may be filed before it alleging that the
" action of any Senator has been corruptly or im-
" properly influenced in the consideration of said bill,
" or that any attempt has been made to so influence
" legislation."

We place these resolutions together for the purpose of carefully contrasting the two; and we ask, upon a general view of their character and contents, what it is that is in the resolution in the case at the bar that opens to the gaze of the public the private affairs of citizens of the United States, and which is *absent* from the resolution in the Kilbourn case ; and which latter resolution was unanimously held not to allow any inquiry into such private affairs.

So far as relates to the enforced disclosure of private affairs and business, each of these resolutions is alike, each seeking to inquire into private affairs. If in this regard there is any difference it is that, in the Kilbourn case, the private affairs sought to be inquired into were alleged to have been fraudulent, or at least unjust and wrongful ; whereas in the case at bar no such accusation regarding the private affairs sought to be inquired

into is made. On the contrary, it is confessed that the affairs asked for were in any and every view, so far as these defendants are concerned, lawful and legitimate. If this difference between the resolutions in the Kilbourn case and the case at bar is material, it certainly operates in favor of excluding the disclosure in the present case more strictly than in the Kilbourn case.

Again: In the case at bar it is impossible fairly to contend that there is anything in the present resolution indicating a desire or purpose on the part of Congress to use the result of the investigation, or the answers to the questions stated in the indictments, for the purpose of aiding in the exercise of any one of the judicial functions in the Senate which are named in the first paragraph of the syllabus to the Kilbourn case. Not only is there nothing authorizing an investigation of the question whether any Senator's vote was improperly influenced if charges to that effect should not be filed, but, on the contrary, the requirement in said resolution that such investigation of improper influence could only be made upon any charge or charges which might be filed before the committee is a direct *negative* of the idea that any prosecution of a Senator was contemplated, or was to be attempted, in the absence of charges, to the effect that Senatorial action had been corrupted or improperly influenced, thereafter filed before the committee.

It is simply evident that this provision, which is the only one looking to a proceeding against a Senator for his conduct touching the sugar schedule, is equivalent to a *prohibition* of any investigation directed against a Senator, or looking to his punishment, in the absence of specific charges filed before the committee. If any authority is needed in support of this, direct authority is to be found in the case *In re Heath* (144 U. S., 93), where the Court says: "The general rule is that the "affirmative description of the cases *in which jurisdic-* "*tion may be exercised implies a negative on the exercise* "*of such power in other cases.*"

It would be quite useless for us to extend the discussion of the resolution in the case at bar for the purpose of showing that it contains *no* affirmative indication, or hint, even, that the investigation was resorted to in aid of the said judicial functions of the Senate, or of its legislative functions. There is no such indication, or even hint. On the contrary, as we have just seen, the second clause of the resolution prohibits any investigation mentioned in it except upon and after specific charges filed with the committee—and none were filed; and the preamble to the resolution expressly declares the motive, object and inducement which prompted its passage, namely, that it was passed because of the publications named therein—one as to bribery, published in the New York "Sun," and the other as to the authorship of the schedule found in the amendment to the tariff bill, published in the Philadelphia "Press." The preamble expressly asserts that it was because of these two publications that the investigation was ordered—this by adding, after its reference to said publication, that, "*Therefore*," the resolution was passed.

As was said by this Court in the case of Heath *(supra)*, the expression of one ground of jurisdiction is a negative of other grounds; so, when the resolution declares that it was adopted because of these newspaper articles, it thereby declares that this is the real and sole ground of investigation. It was resorted to, just as is stated in the quotation above made from the case of *The People vs. Keeler*, "for political "purposes," and was intended to vindicate the parties responsible for the make-up of the tariff bill from the charges made by the Philadelphia "Press," and to clear up the "Sun's" allegation regarding bribery. *This was a very proper and legitimate object and purpose of investigation*, and it is the one which the Senate itself assigns as the ground, and the only ground, aim and purpose thereof.

These considerations conclusively show that the object of the resolution was to counteract and defeat a

scandal started by the said journals, and to direct an investigation *in the event that charges were thereafter filed* accusing Senators of being improperly influenced regarding the tariff bill. This, we submit, is absolutely conclusive of the fact that nothing appears in the record going affirmatively to show that the questions set out in the indictments were asked in aid of the exercise of the judicial functions of the Senate, or in aid of its legislative powers.

VIII.

No Presumptions in Favor of Guilt.

If, therefore, it is to be decided that this investigation looked to the aid of either the legislative or the judicial functions of the Senate, then such conclusion must be reached by sheer and mere *presumption*, in the absence of all facts favoring or supporting it, except the fact that the investigation was ordered; and, moreover, reached in defiance of the express declaration of the resolutions to the contrary!

We have already noticed what was said by the trial Court in a quotation from the case of *The People ex rel. McDonald vs. Keeler* (99 N. Y., 463), regarding "presumptions," to wit:

"We are bound to *presume* that the action of the "legislative body was with a *legitimate object, if it is* "*capable of being so construed*, and we have no right to "assume that the contrary was intended."

We have also conclusively shown—if the authority of the recent decisions of this Court are to have weight, and are not to be overruled as "ancient history"—that the proceedings of a court of limited jurisdiction, such as we have shown the Senate to be, in regard to its powers to punish for contempt, must *affirmatively show*,

in its record, every fact essential to create jurisdiction to compel the disclosure of private affairs.

We have shown that, in order to punish for contempt, the Senate must be exercising one of the judicial functions named in paragraph 1 of the syllabus of the Kilbourn case, or else, *at least*, must be investigating in aid of its power and purpose to legislate; that these facts are jurisdictional and must be affirmed in order to create the power to punish for contempt.

We have also shown that in the resolution at bar neither of the said two jurisdictional facts is affirmatively set forth, and that the opposite is, and we have shown what is thus expressed in the Runkle case, namely, that "the decisions of this court require that "averment of jurisdiction shall be positive; that the "declaration shall state expressly the fact on which "jurisdiction depends. It is not sufficient that jurisdiction may be *inferred argumentatively* from its "averments. * * * That *there are no presumptions* "*in favor of jurisdiction so far as these matters are* "*concerned.*"

These considerations we have heretofore regarded, and still regard, as absolutely conclusive that the committee had no jurisdiction, under the authority given it by the Senate, to attempt this invasion of the private affairs of the defendants, which is set out in the indictments. Here we thought we could safely rest the whole case, but now this doctrine that the jurisdictional facts requisite in order to create jurisdiction in the Senate to punish for contempt will be *presumed* is brought into the case; and we wish to add some suggestions in reply to this position.

Remember that the quotation which we make from the Court of Appeals of New York is one which, in substance, asserts that, if the questions asked relate to a matter as to which a legitimate object or purpose to legislate is *capable* of being attributed, then the presumption is that the investigation was instituted in order to aid that supposable legitimate object. And,

indeed, in the nature of the case, such *must* be the scope of the presumption in order to be available in the case at bar.

Now, we assert that if this newly-discovered doctrine of presumptions against the citizen, and in favor of invading his sacred private rights, is to be followed to its necessary and logical results, there is not in existence a single home or house, not a hearth or bed-chamber, not a private office or workshop, in the land, that is not open to the gaze and put at the mercy of any one who can secure in Congress the adoption of an order to investigate.

This is so, simply because there is manifestly no subject matter of which it can be said that *no* pertinent and appropriate legislation by Congress is possible, and which could be aided or have light thrown upon it by the results of the investigation. Let the members of this Court, for example, test in their own thoughts what we have just said and think of subjects ordered to be investigated by Congress, of which it would be possible to assert affirmatively that no legislation or action by Congress could be resorted to bearing upon it, and which the investigation could by possibility aid in determining upon. Suppose you take some of the most remote and unlikely subjects, as, for instance, the present private indebtedness of the people of the States; or the public indebtedness of the States; or the indebtedness of the municipalities in the United States; or the condition of the roads in the various States; or the state of the public health in the various sections of the Union; or the prevalence of infectious diseases amongst men or animals; or the question of the strength and durability of the different monarchies of the world: It cannot be predicated of any of them that no legislation or other legitimate action by Congress is possible which could be aided and enlightened by proper investigation.

It is, therefore, literally true that if this doctrine of *presumption* is to be applied, and every one who can secure the adoption of a resolution to investigate is to be licensed to compel, under the pains and penalties of imprisonment, the disclosure of private affairs bearing upon the subject under investigation, with liberty to pursue it as far as his sense of public duty or his prurient curiosity, or his greed, or his malice, or his revenge may impel him to go, then we have in this country no possible private home, "castle," sanctuary or retreat, and this, the most valued and most sacred safeguard of civil liberty, is absolutely a delusion and a snare.

When Judge COOLEY teaches us *(Constitutional Limitations, t. p. 367, s. p. 299)* that it is even "a maxim "of the common law which secures to the citizen im- "munity in his home against the prying eyes of the "Government, and protection in person, property and "papers against even the process of the law, except in "a *few specified cases*," that "every man's house is "his castle," and that "this is a part of our constitu- "tional law found in the clauses prohibiting unreason- "able searches and seizures;" that "the poorest man "may, in his cottage, bid defiance to all the forces of "the crown; that it may be frail; its roof may shake; "the wind may blow through it; the storm may enter; "the rain may enter, but the King of England may not "enter; all his forces dare not cross the threshold of "the ruined tenement;" he therein and thereby utters an unalleviated lie; and, besides, is guilty of resorting, in a sober law book, to the merest fustian, if the ruling of the Court below on this subject is sound.

We shall come again to this point as to the jealousy with which our Constitution and laws protect private homes and affairs from invasion.

IX.

Presumptions were not allowed to create jurisdiction to imprison in the Kilbourn case.

We now turn to a more full and direct inspection of the Kilbourn case to see whether the Court there sanctions the doctrine that it will be presumed, in the absence of averment, that that investigation was ordered for some conceivable or possible legitimate action thereon by Congress.

In the trial Court, as already remarked, it was, in substance, alleged, quoting from the case of *People vs. Keeler*, that if there was *any conceivable* action of Congress that *could* be aided by the result of the investigation, then it must be *presumed* that the investigation was resorted to for the purposes of that aid.

Was this doctrine applied to the Kilbourn case?

Most palpably not.

Take, first of all, the matter of impeaching the Secretary of the Navy because of his conduct, condemned in the resolution, in "improvidently" depositing United States funds in Jay Cooke & Company's London branch. Now, we beg to be informed, if this doctrine that a legitimate object, if any is possible, will be presumed is correct, why it was that the Court was not bound to presume that one legitimate object of the resolution was to present against the Secretary articles of impeachment, this being a matter directly within the jurisdiction of the House?

Instead of presuming that articles of impeachment were, in ordering the investigation, aimed at, the Court expressly refuses to so presume, and says (p. 193):

"*If, indeed, any purpose had been avowed to impeach "the Secretary, the whole aspect of the case would have "been changed. But no such purpose is disclosed. None "can be inferred from the preamble, and the character-*

" *ization of the conduct of the Secretary by the term 'im-*
" *provident,' and the absence of any words implying a*
" *suspicion of criminality, repel any such purpose, for*
" *the Secretary could only be impeached for high crimes*
" *and misdemeanors.*"

Here it is not only stated affirmatively that, had the purpose to impeach been "*avowed*" in the resolution, the questions asked of Kilbourn would have been competent, but there is also added to that the declaration that there is an *absence* of any words implying a suspicion of criminality that repels the idea of such purpose. This language is unmistakably plain in its indication that an "*avowed purpose*" must be present in the authority given to the committee to resort to the exercise of one of those judicial powers of the House, or else no such implication will be allowed to arise in order to compel the disclosure of private affairs. Instead of presuming the intent to use the investigation in aid of the functions of the House, the very opposite is here expressly asserted; to wit, that there must be an avowed intent or disclosure so to use the investigation.

Or take this view of the Kilbourn case: This new doctrine of presumptions in favor of guilt asserts that if *any* legislation or judicial action, regarding the subject matter embraced by the resolution, is conceivable or possible, it must be presumed that the investigation was ordered for the purpose of aiding that action or legislation. Suppose this had been the view taken by this Court in the Kilbourn case. Will any lawyer on this continent, who is in his right mind, assert that no legislation could be conceived which would be constitutional and be appropriate in remedy of the mischief embraced in the Kilbourn resolution? Look at the legislation which was competent, without invading the separate powers of the judiciary, in this Kilbourn case.

For example, Cooley's Constitutional Limitations (s. p., 387) declares that, "without impairing the obli-
" gation of the contract, the *remedy* may certainly be

" modified as the wisdom of the nation shall dictate." So the Supreme Court of the United States in the case of *Gut vs. Minnesota* (9 Wall., 37-8) holds that it was competent for Congress to pass laws changing the place of trial. So it was competent for Congress to pass laws changing the class of persons who might testify in a pending case, as held in *Horst vs. Utah* (110 U. S., 574, 589). So it was competent for Congress to pass laws creating new and additional remedies, such as attachment and imprisonment, or any other legislation going merely to affect the *remedy*. So it was perfectly competent for Congress to pass an act authorizing some officer of the United States to compromise the case named in the Kilbourn resolution, so far as the United States was concerned.

Shall it be said that none of these laws was constitutionally and legally *possible* to be enacted, and that no useful light could, by the pending investigation, be thrown upon the question of passing any one of these laws? Take, for illustration, the matter of authorizing a compromise. In innumerable cases special acts have been passed so authorizing the Attorney-General or some other officer to compromise suits in which the United States were concerned. A conspicuous example of this is found in the act approved June 9, 1880, entitled "an " act to authorize the compromise of the claims of the " United States under the will of Joseph L. Lewis" *(21 Stats., 171)*. There a bequest to the United States was made exceeding a million of dollars. A contest was instituted to break the will, and the Secretary of the Treasury and the Attorney-General were authorized, if they saw fit, to adjust or compromise the claim of the United States under said devise upon such terms and conditions as should be deemed by them fair and reasonable. And so it was compromised.

Can anybody assert that it was impossible that such a compromise may have been looked to in passing said resolution to investigate in Kilbourn? If it cannot be

so asserted, why did the Court not "*presume*" that this was one object in passing the resolution?

Again: Take the case of the *United States vs. Union Pacific Railroad Co.* (98 U. S., 569, 605 *et seq.*), decided in 1878, two years before the Kilbourn case, the opinion being by the same Justice that delivered the opinion in the Kilbourn case. That was a case that was most fully and ably argued by the very first lawyers of America, and the question regarding the power of Congress to create special jurisdictions in the courts, there decided, is accurately indicated in headnotes, as follows:

"1. The Act of March 3, 1873 (17 Stats., 509), is a "valid and constitutional exercise of legislative power. "Congress, by requiring the Attorney-General to bring "a suit in equity in name of the United States in any "Circuit Court against the Union Pacific Railroad "Company and others, intended, *not to change* the sub- "stantial rights of the parties to the suits, but to pro- "vide a *specific* mode of procedure, which, by remov- "ing certain restrictions on the jurisdiction, process "and pleading which are in other cases imposed, would "give a larger scope to the action of the Court, and a "more economical and efficient remedy than before ex- "isted.

"2. The provisions authorizing process to be served "without the limits of the district where the suit might "be brought, and parties and subjects of controversy "to be united, which, in an ordinary chancery suit, "would render a bill multifarious, are regulations of "practice and procedure which are subject to legislative "control.

"3. Statutes have been frequently passed directing "suits for specific objects to be brought by an attorney- "general, and regulating the proceedings in them, such "as a *quo warranto*, or a bill in equity against a cor- "poration to test its right to the exercise of its fran- "chises, or to declare them forfeited, or, if insolvent, "to wind up its business and distribute its assets; and

" the validity of such statutes has uniformly been rec-
" ognized."

Under this decision, it was perfectly competent for Congress to pass a law ordering the Attorney-General to bring a suit to enforce the rights of the Government *as they, in law and equity, existed* in the matter covered by that resolution. At page 605 (98 U. S.), in the opinion, the Court states as follows:

" But, if this be otherwise, we are aware of no con-
" stitutional objection to the power of the legislative
" body to confer on an existing court a *special jurisdic-*
" *tion to try a specific matter* which, in its nature, is of
" judicial cognizance.

" The principal defendant in this suit, the one around
" which all the contest is ranged, is a corporation
" created by an act which reserved the right of Con-
" gress to repeal or modify the charter. To this cor-
" poration Congress made a loan of $27,000,000, and a
" donation of lands of the value probably equal to the
" loan.

" The statute books of the States are full of acts
" directing the law officers to proceed against corpora-
" tions, such as banks, insurance companies, and others,
" in order to have a decree declaring their charters for-
" feited. Special statutes are also common, ordering
" suits against such corporations when they have be-
" come insolvent, to wind up their business affairs and
" to distribute their assets, and prescribing with mi-
" nuteness the *course of procedure* which shall be
" followed and the court in which the suit shall be
" brought.

" This Court said, in the case of *The Bank of Colum-*
" *bia vs. Okley* (4 Wheat., 235), in speaking of a sum-
" mary proceeding given by the charter of that bank
" for the collection of its debts: ' *It is the remedy, and not*
" ' *the right, and as such we have no doubt of its being*
" ' *subject to the will of Congress. The forms of admin-*
" ' *istering justice, and the duties and powers of courts as*
" ' *incident to the exercise of a branch of sovereign power,*

" ' *must ever be subject to legislative will, and the power*
" ' *over them is inalienable so as to bind subsequent legis-*
" ' *latures.*' And in *Young vs. The Bank of Alexandria*
" (4 Cranch, 397) Mr. Chief-Justice MARSHALL says:
" ' There is a difference between those rights on which
" ' the validity of the transactions of the corporation
" ' depends, which must adhere to those transactions
" ' everywhere, *and those peculiar remedies which may*
" ' *be bestowed on it.* The first are of general obliga-
" ' tion; the last, from their nature, can only be
" ' exercised in those courts which the power making
" ' the grant can regulate' (see, also, *The Common-*
" *wealth vs. The Delaware and Hudson Canal Co.*, 43
" Pa. St., 227; *State of Maryland vs. Northern Central*
" *Railroad Co.*, 18 Md., 193; *Colby vs. Dennis*, 36 Me.,
" 1; *Gowan vs. Penobscot Railroad Co.*, 44 *Id.*, 140).

" Statutes of this character, if not so common as to
" be called ordinary legislation, are yet frequent enough
" to justify us in saying that they are well recognized
" acts of legislative power uniformly sustained by the
" courts."

Observe in the above quotation what is said in the opinion cited from 4 Wheaton, 235, and also in that cited from 4 Cranch, 397, in regard to the power of Congress to deal with matters of mere remedy.

At page 608 (98 U. S.) it will be seen that the Court remarks on the fact that the Attorney-General *is peremptorily ordered* to bring this proceeding, and that was held competent and not to interfere with the province of the judiciary. At page 146 (18 Stats.) the Attorney-General is peremptorily ordered to institute such prosecution as public justice may require in order to enforce the rights of the Government to the money involved in the bankruptcy of Henry D. Cooke, *or of Jay Cooke & Co.* This act was approved June 22, 1874, some two years before the adoption of the Kilbourn resolution (see 103 U. S., 171).

All such legislation as that which we have here pointed to was, as is seen by the syllabus which we have

above quoted from the case of *United States vs. Union Pacific Railroad Co.*, perfectly legitimate, constitutional and in no way or degree *invading the powers and rights of the judiciary.* What we have quoted from the opinion of Justice MILLER in said case is completely conclusive in favor of the constitutionality and competency of such legislation. There the Court, as we have seen, states this matter as follows :

" It is the remedy, and not the right, and as such we " have no doubt of its being subject to the will of Con- " gress. The *forms* of administering justice, and the " duties and powers of courts as incident to the exer- " cise of a branch of sovereign power, must ever be sub- " ject to legislative will, and the power over them is " inalienable so as to bind subsequent legislatures."

These citations and examples abundantly establish the proposition that if the Court is bound to *presume* that the Kilbourn resolution was passed in order to aid in executing some judicial function of the Senate or some legislation that was constitutionally possible and conceivable, then it could not have decided, as it did, that no questions as to private business could be asked under the Kilbourn resolution.

It is to be carefully observed and kept in mind that, in so far as the opinion in the Kilbourn case comments upon the attempted invasion of the separate powers of the judiciary, as seen in the Kilbourn resolution, the Court does not intimate, nor does it mean, that such legislation as we have above pointed out was not competent, and would be an invasion of the powers of the judiciary.

What the Court in substance and effect does mean to say in that regard is that it appeared to be the view of the House and committee that the object of the investigation was to take charge of the adjudication of the claim of the Government and of the actual collection of the debt owing to the United States and named in the resolution, and to thus usurp the functions that belonged exclusively to the judiciary.

It is not the view of the Court that laws providing new remedies or affecting remedies existing would constitute any such invasion of the province of the judiciary, or were not competent and appropriate to be enacted.

No; the exact truth is, as is shown by the entire scope of the opinion, that the reason why the Court held that *aid*, in the exercise of the judicial or the legislative functions of the House, was not contemplated, in ordering the investigation, was not because such aid was legally and constitutionally impossible, but was because no such aid to the functions of the House was "avowed" (103 U. S., 193) as any part of the object of the resolution. Therefore, a design to obtain, by means of said investigation, such aid to the exercise of the constitutional functions of the House could not be *presumed* or considered any part of such object, or used to give jurisdiction to inquire, under the pains and penalties of imprisonment for contempt into such private affairs.

It is thus rendered incontrovertibly plain and conclusive that this great case does not *stop* at deciding merely that a House of Congress cannot delegate to one of its committees that power to adjudicate claims, and collect them, which the Constitution confers exclusively upon the Courts, but is devoted, in its great aim and purpose, to settling the law to be that the private affairs of the citizen cannot be invaded by investigations under the authority of the Houses of Congress, except under such limitations and restrictions and "vigilant watchfulness" *(p. 192)*, as is uniformly and rigorously applied in the Courts of the country in the defense of those rights which are secured by that principle of the common law now embodied in the Fourth and Fifth Amendments to the Constitution; and, further, that these limitations and safeguards, and this vigilance, prohibit the compulsory disclosure of private affairs, except where it is *affirmatively shown in the record that the disclosure is essential to the enforcement, by the Courts and houses of*

legislation, some specifically defined and recognized right, public or private, which the Courts or the houses are bound to enforce, and the enforcement of which would be defeated, or at least jeopardized, if the enforced disclosure were not made.

We submit these views of the Kilbourn case in absolute confidence that, if it is followed, the Court must find that the committee was without jurisdiction or power to compel the defendants to disclose their private affairs under the facts and conditions appearing in the record—was without jurisdiction or power for the same reasons that the committee was without jurisdiction and power in the Kilbourn case; the resolution in the case at bar not being broader in its conferment of power than the resolution in the Kilbourn case, and, indeed, for the reasons we have above stated, not near so broad.

X.

Scope of the Kilbourn Decision.

Our allusions to this Kilbourn case have been, in the main, to show that this doctrine on which the demurrer filed in this case was overruled—namely, that it will be presumed that the investigation was ordered with the aim and purpose of aiding the Senate in executing some one or more of its constitutional functions, if any such aid was constitutionally conceivable or possible—could not have been the view of this Court in reaching its unanimous decision in that case, affirming that no disclosure of private affairs could be compelled under the authority of the Kilbourn resolution.

But it is proper now to beg the attention of the Court to other bearings of that decision on the present case, which are, if possible, still more decisive in support of our position.

It cannot, of course, be denied, and is not denied, that the Court directly and squarely met the broad question at issue in that case; namely, could Mr. Kilbourn, under the authority of that resolution, be compelled to disclose the private business which the committee then demanded of him? The Court answered it directly, squarely and without dissent, hesitation or ambiguity, answered that he could not be so compelled; and that the asking of the question was beyond the jurisdiction and power of the committee, and that his imprisonment was unlawful.

On page 196, after a full review of the entire case, the Court sums up its conclusions in the following words:

"We are of opinion, for these reasons, that the "resolution of the House of Representatives, author- "izing the investigation, was in excess of the "power conferred on that body by the Constitu- "tion; that the committee, therefore, had no lawful "authority to require Kilbourn to testify as a witness "beyond what he voluntarily chose to tell; that "the orders and resolutions of the House, and the war- "rant of the Speaker, under which Kilbourn was im- "prisoned, are in like manner void for want of juris- "diction in that body, and that his imprisonment was "without any lawful authority."

True it is that, among the reasons assigned in this quotation from the Court's opinion, *one* is that the Court construed the resolution as authorizing the committee *itself* to assume the functions of the courts and to adjudicate on and collect the alleged indebtedness of Jay Cooke & Co. to the Government, and the Court condemned this as an attempt, by the Legislature, to invade the exclusive province of the judiciary. But this is not the *only*, nor, indeed, the *chief*, ground on which the Court based the conclusion expressed in what we have above quoted from page 196 of the opinion.

If such invasion of the province of the judiciary were the real and the *only* ground for reaching the conclusion quoted from page 196, then that ground was, taken by itself, all-sufficient to defeat the jurisdiction of the House, and to render the imprisonment of Kilbourn unlawful. And, in that view, the great body of this most exhaustive opinion, which went to show that "the cases in which" the House of Congress can punish for contempt "are very limited" *(p. 197)*; and that "neither of the Houses possesses the general "power of making inquiry into the private affairs of "the citizen" *(p. 190)*, becomes and is outside of the case and is the merest *obiter dictum*.

This is palpably so, not only for the reason just stated—namely, that, if the resolution was an attempt to bestow on a committee of Congress the powers of the judiciary, for that reason alone, and taken by itself, the resolution was void, and the jurisdiction of the committee was at an end—but also because the entire body of the opinion bearing upon the origin, nature and extent of the power of the Houses to compel disclosures of private affairs, and to punish for contempt, *has no bearing* whatever upon the matter of the absence of power in the Houses to assign to one of the committees functions confided by the Constitution exclusively to the courts.

This remarkable opinion which, by the way, has received the approval of all the courts of the English-speaking world, and, we believe, of all the civilized and enlightened States, not only expressly affirms that the House had given to the committee no power to inquire into the private affairs of the citizen under said resolution—not only affirms that the Houses of Congress could give to the committee no power to inquire into such private affairs except in a "*very limited class of cases*" *(p. 197)*, and "*under special circumstances*" *(bot. p. 197)*—not only expressly holds that, outside of such "limited class of cases," and such "special circumstances," the "House of Representatives had no power

or authority in the matter more than any other equal number of gentlemen interested in the government of the country" *(top p. 195)*;—not only holds that this "limited class of cases" and "special circumstances" took in only cases where the House resorted to the investigation *in order to enable it to execute one of its judicial functions, or, at most, some constitutional function (bot. p. 194; also p. 190, next to last paragraph)*, but also proceeds, at great length, and with the most exhaustive research and learning, derived from the parliamentary history and law of England, from the common law of England, from the parliamentary law recognized in these States, and from a review of the prior decisions of the Supreme Court of the United States, including the case of *Dunn vs. Anderson*, to establish these several and respective propositions.

Therefore, the great body of this entire opinion, and this vast array of authority and exhibition of learning, bearing upon the matters just enumerated, and deciding them respectively, were all wholly out of place, and were worthless in the case if the Court meant to exclude the questions from being asked upon the *sole* ground that the resolution invaded the exclusive province of the Courts, and did not mean to base that decision *primarily* upon the special and limited powers of the Houses to pry into the private affairs of the citizen by compelling, under the pain and penalty of imprisonment, the exposure of such affairs.

XI.

Other Authorities and Points.

We now beg the indulgence of the Court in presenting to it some additional points and authorities, all going, in perhaps different degrees of directness, to

support the main positions which we have presented above.

1. Regarding the jealousy and extreme watchfulness with which the Courts guard against the insidious invasions of the rights secured by the Fourth and Fifth Amendments to the Constitution, and by the equivalent principles of the common law now embodied in said amendments, we wish especially to impress upon our argument some of the utterances, touching this matter, of this our Supreme Court.

In the case of *Boyd vs. United States* (116 U. S., 635) Justice BRADLEY, in delivering the unanimous opinion of the Court, states as follows:

"It may be that it is the obnoxious thing in its mild-
"est and least repulsive form" (speaking of unreason-
able searches, &c.); "but illegitimate and unconstitu-
"tional practices get their first footing in that way—
"namely, by silent approaches and slight deviations
"from legal modes of procedure. This can only be
"obviated by adhering to the rule that constitutional
"provisions for the security of persons and property
"should be liberally construed. A close and literal
"construction deprives them of half their efficiency,
"and leads to gradual depreciation of the right, as if
"it consisted more in sound than in substance. It is
"the duty of courts to be watchful for the constitu-
"tional rights of the citizen and against any stealthy
"encroachments thereon. Their motto should be *obsta*
"*principiis*. We have no doubt that the legislative
"body is actuated by the same motives; but the vast
"accumulation of public business brought before it
"sometimes prevents it, on first presentation, from
"noticing objections which become developed by time
"and the practical application of the objectionable
"law."

This, it will be remembered, is the opinion in which the Court held the fifth section of the Act of the 22d

of June, 1874 (18 Stats., 187), to be unconstitutional as violative of the Fifth Amendment.

In the case of *Counselman vs. Hitchcock* (142 U. S., 580 *et seq.*), decided in 1891, this opinion in the case of *Boyd vs. United States* is distinctly reaffirmed, and on page 582 what we have above quoted is again repeated and reaffirmed.

Of course, this is very familiar law; but in construing the provision of constitutional and statute law which protects the petitioner herein from being compelled to disclose to the world his private affairs, these rules of interpretation cannot be too earnestly impressed upon the attention of the courts; especially those provisions of the law which require the courts, in all cases, to refrain from compelling the throwing open to the public gaze of private homes and private affairs "in cases and under circumstances where they could "not be compelled to produce the same by ordinary "rules of proceedings in chancery" (Sec. 724, Rev. Stats., U. S.; *Paine vs. Warren*, 33 Fed. R., 358).

2. Another point: We have occasionally grouped together the protections afforded by the Fourth and by the Fifth Amendments to the Constitution—this because they really intermingle and run into each other in the rights and protections which they furnish to the people. In regard to this matter of the intermingling of these provisions of the two amendments, in the case of *Boyd vs. United States (supra)*, Justice BRADLEY says, in the opinion from which we have already quoted, as follows:

"We have already noticed the intimate relation be-
"tween the two amendments. They throw great light
"on each other. For the 'unreasonable searches and
"'seizures' condemned in the Fourth Amendment are
"almost always made for the purpose of compelling a
"man to give evidence against himself, which in crim-
"inal cases is condemned in the Fifth Amendment; and
"compelling a man 'in a criminal case to be a witness

" ' against himself,' which is condemned in the Fifth " Amendment, throws light on the question as to what " is an unreasonable search and seizure within the " meaning of the Fourth Amendment. And we have " been unable to perceive that the seizure of a man's " private books and papers, to be used in evidence " against him, is substantially different from compel- " ling him to be a witness against himself. We think it " is within the clear intent and meaning of those terms. " We are also clearly of opinion that the proceedings " instituted for the purpose of declaring the forfeiture " of a man's property by reason of offenses committed " by him, though they may be civil in form, are in their " nature criminal."

3. Again: The rights secured to the people by the Fourth and Fifth Amendments to the Constitution and those analogous provisions of the common law protective of liberty, from which those amendments were, in substance, derived, are not restricted to the mere letter of the amendments, as, for example, restricted to securing the "person" of the citizen, or "his home," or his "papers," or his "effects," and leaving all other private affairs unprotected.

On the contrary, Justice BRADLEY, in said case of Boyd, in commenting upon the scope of Lord CAMDEN'S judgment in the case of *Entick vs. Carrington* (19 Howell's State Trials, 1029), rightly states the scope of that decision, and of the principles of law now embodied in the Fourth and Fifth Amendments, as follows, on page 630 (116 U. S.):

" The principles laid down in this opinion affect the " *very essence* of constitutional liberty and security. " They reach farther than the *concrete form of the case* " *then before the Court*, with its adventitious circum- " stances; they apply to *all invasions on the part of the* " *Government and its employees of the sanctity of a* " *man's home and the privacies of life.* It is not the " breaking of his doors and the rummaging of his draw-

" ers that constitutes the *essence of the offense;* but it " is the invasion of his indefeasible right of personal " security, personal liberty and private property, where " that right has never been forfeited by his conviction " of some public offense; *it is the invasion of this sacred " right which underlies and constitutes the essence of " Lord Camden's judgment.* Breaking into a house " and opening boxes and drawers are circumstances of " aggravation; but any forcible and compulsory extor- " tion of a man's own testimony, or of his private " papers, to be used as evidence to convict him of " crime, or to forfeit his goods, is within the condem- " nation of that judgment. In this regard the Fourth " and Fifth Amendments run almost into each other.

" Can we doubt that when the Fourth and Fifth " Amendments to the Constitution of the United States " were penned and adopted, the language of Lord CAM- " DEN was relied on as expressing the true doctrine on " the subject of searches and seizures, and as furnish- " ing the true criteria of the reasonable and unreason- " able character of such seizures? "

4. Again, as bearing on the matter of the intrinsic and inestimable value of the securities given to private life and affairs by these Amendments, and by the analogous principles of the common law, and also as establishing that these protections are not confined to merely prohibiting compulsory production, exposure or seizure of papers, books, homes, and other tangible objects, but likewise forbid the compulsory exposure *by a party's own evidence* of his private affairs, and this whether in a criminal or a civil proceeding, we now appeal to the concurring opinions of Justices FIELD and SAWYER in the case of *Pacific Railway Commission* (32 Fed. Rep., 249 to 269, inclusive), we present from the opinion of Justice FIELD in that case, as found on pages 250, 251, the following extract, to each part of which we beg the careful attention of the Court:

" In the recent case of *Boyd vs. United States*, 116 " U. S., 616, 6 Sup. Ct. Rep., 524, the Supreme Court " held that a provision of a law of Congress which " authorized a court of the United States in revenue " cases, on motion of the Government attorney, to re- " quire the defendant or claimant to produce in court " his private books, invoices and papers, or that the " allegations of the attorney respecting them should be " taken as confessed, *was unconstitutional and void* as " applied to suits for penalties or to establish a forfeit- " ure of the party's goods. The Court, speaking by " Mr. Justice BRADLEY, said :

" ' *Any compulsory discovery by extorting the party's* " ' *oath, or compelling the production of his private books* " ' *and papers, to convict him of crime or to forfeit his* " ' *property, is contrary to the principles of a free gov-* " ' *ernment.* It is abhorrent to the instincts of an En- " ' glishman; it is abhorrent to the instincts of an " ' American. It may suit the purpose of despotic " ' power, but it cannot abide the pure atmosphere of " ' political liberty and personal freedom.'

" *The language thus used had reference, it is true, to* " *the compulsory production of papers as a foundation* " *for criminal proceedings, but it is applicable to any* " *such production of the private books and papers of a* " *party, otherwise than in the course of judicial proceed-* " *ings, or a direct suit for that purpose.* It is the " forcible intrusion into, and compulsory exposure of " one's private affairs and papers without judicial pro- " cess, or in the course of judicial proceedings, which " is contrary to the principles of a free government, " and is abhorrent to the instincts of Englishmen and " Americans.

" In his opinion in the celebrated case of *Entick vs.* " *Carrington*, reported at length in 19 How. State Tr., " 1029, Lord CAMDEN said :

" ' Papers are the owner's goods and chattels; they " ' are his dearest property, and are so far from endur- " ' ing a seizure that they will hardly bear an inspec-

" ' tion; and though the eye cannot, by the laws of
" ' England, be guilty of a trespass, yet, where papers
" ' are removed and carried away, the secret nature of
" ' those goods will be an aggravation of the trespass,
" ' and demand more considerable damages in that
" ' respect. Where is the written law that gives any
" ' magistrate such power? I can safely answer there
" ' is none; and, therefore, it is too much for us, with-
" ' out such authority, to pronounce a practice legal
" ' which would be subversive of all the comforts of
" ' society.'

" Compulsory process to produce such papers, *not in* " *a judicial proceeding*, but before a commissioner of " inquiry, is as subversive of ' all the comforts of " ' society,' as their seizure under the general warrant " condemned in that case. The principles laid down " in the opinion of Lord CAMDEN, said the Supreme " Court of the United States, ' affect the very essence " ' of constitutional liberty and security. They reach " ' further than the concrete form of the case then " ' before the court with its adventitious circumstances; " ' they apply to all invasions on the part of the Gov- " ' ernment, and its employes, of the sanctity of man's " ' home and the privacies of life.'

" In *Kilbourn vs. Thompson*, 103 U. S., 168, we have " a decision of the Supreme Court of the United " States that neither House of Congress has the power " to make inquiries into the private affairs of the citi- " zen; that is, to compel exposure of such affairs."

This opinion of Justice FIELD has been expressly approved and followed in *Interstate Commerce Commission vs. Brimson* (54 U. S., 479), and in innumerable cases in the courts of the United States, and, so far as we can find, has been disapproved by no one of them.

5. Again, we wish to fix in the attention of the Court certain suggestions, the result and outcome of which are to say that if the committee, in asking the questions set out in the indictments, was doing so outside of, or

in excess of the jurisdiction and power given to it by the Senate resolution, then the refusal to answer was perfectly lawful, and was not a violation of Section 102 of the Revised Statutes.

Stated in other words, our present proposition is that if the committee, in asking such questions demanding the disclosure of private affairs, went beyond the power and jurisdiction conferred upon it by the Senate resolution, then the indictments of defendants for refusing to answer are not defective as merely involving *error* in a matter of law; but, on the contrary, the asking of said questions, and the indictments in this case for refusal to answer, are matters *wholly outside and in excess of jurisdiction*, and are, therefore, absolutely void, and any imprisonment inflicted under a conviction in this case would be "false imprisonment," and the defendants would be entitled to discharge on *habeas corpus*.

This is explicitly held in the Kilbourn case in summing up the opinion in that case in language which we have already quoted in another connection, and which we here repeat, as follows:

"We are of opinion, for these reasons, that the reso-
"lution of the House of Representatives authorizing
"the investigation was in excess of the power con-
"ferred on that body by the Constitution; that the
"committee, therefore, had no lawful authority to re-
"quire Kilbourn to testify as a witness beyond what
"he voluntarily chose to tell; that the orders and
"resolutions of the House, and the warrant of the
"Speaker, under which Kilbourn was imprisoned, are
"in like manner void for want of jurisdiction in that
"body, and that his imprisonment was without any
"lawful authority."

In the case of *Counselman vs. Hitchcock* (142 U. S.), he was imprisoned for refusing to answer questions put to him by the Grand Jury in a prosecution for an alleged violation of the Interstate Commerce Law *(24 Stats., 379; 25 Stats., 855)*, and which questions the Circuit Court had decided that he was obliged

to answer, his refusal to answer being put upon the ground that his answers might tend to show that he himself had committed a crime. He applied to the said Circuit Court for a discharge from imprisonment under a writ of *habeas corpus (44 Fed. Rep., 268)*. Judge GRESHAM overruled his petition for discharge, and remanded him to custody of the marshal and discharged the writ of *habeas corpus*. He excepted to the order of the Court refusing to discharge him, and took an appeal to the Supreme Court of the United States, and was admitted to bail pending such appeal. Thus, this case reached the Supreme Court *(p. 553)*, and the Supreme Court of the United States, on such appeal, discharged the prisoner on *habeas corpus*. Amongst the important things decided in the case was the following principle, stated in the third paragraph of the head note :

" The meaning of the constitutional provision " (Fifth Amendment) " is not merely that a person shall not be " compelled to be a witness against himself in a crim- " inal prosecution, but its object is to insure that a " person shall not be compelled, when acting as a wit- " ness, in any investigation, to give testimony which " may tend to show that he himself has committed a " crime."

So far as relates to the matter of an imprisonment by orders, judgments or decrees made in absence of jurisdiction, being absolutely void in law, and as constituting false imprisonment, and also in so far as relates to such imprisonments not involving mere error, but being void owing to the absence of power or jurisdiction, and being relievable on *habeas corpus*, the same thing is found in a great multitude of cases decided by the Supreme Court.

Amongst these cases we may name *Wilson's Case* (114 U. S., 417) ; *Mackin's Case* (117 U. S., 348) ; *Bain's Case* (121 U. S., 1) ; *Stebold's Case* (100 U. S., 371) ; *Clarke's Case* (100 U. S., 399) ; *Lange's Case* (18 Wall., 163) ; *Nielsen's Case* (131 U. S., 176) ; *Snow's*

Case (120 U. S., 274); *Roland's Case* (104 U. S., 604); *Fisk's Case* (113 U. S., 713); *Ayres' Case* (123 U. S., 443); *Sawyer's Case* (124 U. S., 200); *Cudhey's Case* (113 U. S., 280); *Ex parte Terry* (128 U. S., 289).

XII.

Interstate Commerce Commission vs. Brimson, 154 U. S., 447.

Some use, not very important, was made in the Court below of the case of *Interstate Commerce Commission vs. Brimson* (154 U. S., 447), especially that part of the opinion *(pp. 470–2)* which insists upon an *implied* power in Congress to enact such legislation as is found in Section 12 of the Interstate Commerce Act, set forth at pages 461 *et seq.* of 154 United States Reports. This section gives to the Commission authority to demand complete information to carry out the objects of the act; authorizes it to execute the act, makes it the duty of the District Attorney, on the application of the Commission, to institute suits, under the direction of the Attorney General, for the enforcement of the provisions of the act, and for the punishment of violations thereof; gives the Commission power to require the attendance of witnesses and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation, and, in case of disobedience to a subpœna, to invoke the aid of a Court of the United States in requiring the attendance and testimony of witnesses and the production of books and papers; and gives the Circuit Courts of the United States, in the proper district, in case of contumacy or refusal to obey subpœnas, authority to issue an order requiring the carrier

or other person to appear before the Commission, and to produce books and papers if so ordered, and to give evidence touching the matters in question, and makes the failure to obey such order of the Court liable to be punished *as contempt*, and provides that the tendency of the evidence to criminate the witness shall not excuse his testifying, but says that the evidence shall not be used against him in any criminal proceeding, &c., &c.

Now, although some parts of this opinion may, especially owing to the dissent of three of the Justices and the failure of Justice FIELD to take any part in the decision, be still regarded as very doubtful law in the parts to which said dissent applies, yet we have no occasion to rely on such doubts, if any there be. So far as this case has any application to the case at bar, it is strongly and decidedly in favor of our demurrer—this because it expressly and strongly asserts and reaffirms all the doctrines which we have above quoted from the case *In re Pacific Railway Commission* (32 Fed. Rep., 241, 250); also the doctrines of *Counselman vs. Hitchcock* (142 U. S., 547). This will be seen at pages 478, 479 and 480 (154 U. S.). The case, moreover, strongly reiterates and reaffirms all the doctrines which we have quoted from the cases asserting the inestimable value of the protection furnished to the citizen by the Fourth and Fifth Amendments to the Constitution, and the necessity of guarding and enforcing such rights in the courts and everywhere with ceaseless vigilance.

The substance of the entire case is, that owing to the grant to Congress of the power to regulate commerce between the States, there is carried with it the implied power to enact the provisions above recited as found in said 12th section, and that it was lawful for Congress to make it a contempt of court not to obey the order of the court, and to give testimony as there required; and that although the *Commission* could not punish as a contempt of its authority a re-

fusal to appear and testify, yet Congress could make such refusal in the court to be an offense, or contempt, and could give the United States courts jurisdiction to try and punish such contempt, leaving, however, to the defendant the right to defend, by showing that said refusal was justifiable owing to personal exemptions, &c., secured to him in that particular case by the Constitution. This is the entire scope of the decision by the majority of the Court, and surely it is unnecessary to say that it nowhere touches, adversely to the petitioner, any part of the *defense urged in this case.*

Respectfully submitted,

GEORGE F. EDMUNDS,
J. W. WILSON,
A. J. DITTENHOEFER,
Of Counsel for the Petitioner.

166 US 661

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 11, ORIGINAL. 166 — 661.

EX PARTE: IN THE MATTER OF ELVERTON R. CHAPMAN, PETITIONER.

RETURN TO RULE.

Comes now Albert A. Wilson, marshal of the United States for the District of Columbia, and responding to the order of this honorable court of the 4th day of January, A. D. 1897, that he show cause why the prayer of the petition of the above-named petitioner should not be granted, respectfully shows:

That on the said 4th day of January, A. D. 1897, he held the body of the petitioner under a commitment of the supreme court of the District of Columbia in cause numbered 19985 on the criminal dockets of the said court, the said cause being the same mentioned and referred to in the said petition, and that on the said 4th day of January, A. D. 1897, in obedience to the order of this honorable court in that behalf, the said petitioner was released on bail pending the hearing of his petition, as by the record of this honorable court in that behalf more fully appears; and that the said petitioner is now at large on bail by virtue of the said order of this honorable court in that behalf; and the respondent files herewith a copy of the record and proceedings of the said supreme court of the District of Columbia in said cause No. 19985, as the same are of record in the court of appeals of the District of Columbia, mentioned in the said petition and also a copy of the commitment aforesaid.

ALBERT A. WILSON,
Marshal of the United States for the District of Columbia.

I, Albert A. Wilson, on oath say that I am the marshal of the United States for the District of Columbia, and the respondent to the above petition; that I have read said petition and know the contents thereof; that the averments therein made of my own knowledge are true, and that those made upon information and belief I believe to be true.

ALBERT A. WILSON.

Subscribed and sworn to before me this 19th day of March, A. D. 1897.

[SEAL.] JOHN R. YOUNG,
Clerk.

In the supreme court of the District of Columbia, holding a criminal court for said District the 4th day of January, 1897.

THE UNITED STATES
vs.
ELVERTON R. CHAPMAN. } No. 19985.

The defendant, having been found guilty of violation of section 102, R. S. U. S., has been sentenced to be imprisoned in the common jail of the District of Columbia for the period of one (1) month and to pay a fine of one hundred ($100) dollars, and in default of payment of said fine to stand committed further until paid.

Teste:
[SEAL.]

J. R. YOUNG, *Clerk.*
By F. W. SMITH, *Assistant Clerk.*

(Indorsed:) Certificate. Sentence to common jail, D. C. Criminal Court No. 1.

(Indorsed:) Supreme Court, U. S. October Term, 1896. Term No., 11. Orig'l. Ex parte: In the matter of Elverton R. Chapman, petitioner. Return to rule. Filed Mar. 20, 1897.

164
164-436

Office Supreme Court, U. S.
FILED.
MAR 30 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ELVERTON R. CHAPMAN, PLAINTIFF in error,
v.
THE UNITED STATES.
} No. 11, Original.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ELVERTON R. CHAPMAN, PLAINTIFF in error,
v.
THE UNITED STATES.
} No. 11, Original.

BRIEF FOR THE UNITED STATES.

The petitioner is here applying for the writ of habeas corpus, and, as ancillary thereto, a writ of certiorari to bring up the record of the case on which he was tried and convicted.

He is here, also, asking for a writ of certiorari under the act of Congress of March 3, 1897, which provides:

> That in any case heretofore made final in the court of appeals of the District of Columbia it shall be competent for the Supreme Court to require, by certiorari, or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

On the habeas corpus only the question of the jurisdiction of the court, by whose judgment the petitioner is held, can be considered here; while on the certiorari a review of the whole case may be had, as on writ of error.

ON THE PETITION FOR HABEAS CORPUS.

The jurisdiction of the trial court is denied here, on the grounds—

First. That the acts of Congress under which the petitioner was tried were unconstitutional.

Second. That the proceedings of the trial court were so irregular as to amount to a denial of justice.

WAS THE STATUTE UNCONSTITUTIONAL?

CONSTITUTIONALITY OF SECTIONS 102, 103, AND 104, REVISED STATUTES.

These sections are as follows:

> SEC. 102. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony, or to produce papers, upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars, nor less than one hundred dollars, and imprisonment in a common jail for not less than one month, nor more than twelve months.
>
> SEC. 103. No witness is privileged to refuse to testify to any fact or to produce any paper respecting which he shall be examined by either House of Congress, or by any committee of either House,

upon the ground that his testimony to such fact, or his production of such paper, may tend to disgrace him, or otherwise render him infamous.

SEC. 104. Whenever a witness, summoned as mentioned in section 102, fails to testify and the facts are reported to either House, the President of the Senate, or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or the House, to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

These sections, it is insisted by petitioner's counsel, are in violation of the Constitution on several grounds.

The original act was approved January 24, 1857 (11 Stat., 155), and is entitled "An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony."

Section 104 was amended by act approved January 24, 1862 (12 Stat., 333).

The charge of unconstitutionality is placed upon the grounds—

First. That the language is too broad and unlimited in its extent, for instance, in section 102—"upon *any* matter under inquiry," or "*any* committee of either House * * * refuses to answer *any* question pertinent to the question under inquiry." And in section 103 "* * * refuse to testify to *any* fact, or to produce *any* paper, * * * or by *any* committee of either House."

That the word "*any*" means *all* and *every;* and being in a penal statute, does not admit of any limitation by the

courts. That any such construction, Mr. Edmunds insists, would be to "rebuild a criminal statute by implication." And yet eighty years ago, Chief Justice Marshall, construing an "Act for the punishment of certain crimes against the United States," in *United States* v. *Palmer* (3 Wheat., 610), referring to the eleventh section of that act, which spoke of "*any* murder, felony, robbery, piracy, or other crime whatsoever," and to the eighth section, which, as well as the eleventh, spoke of "*any* person or persons," and also of "*any* captain," said (p. 631):

> But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation; for this intent we must examine the law. * * *
>
> The words any "captain or mariner of any ship or other vessel" comprehends all captains and mariners as entirely as "any person or persons" comprehend the whole human race. * * *
>
> That the general words of the two latter members of this sentence are to be restricted to offenses committed on board the vessels of the United States, furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of the sentence.

The dictionaries teem with illustrations of the limitation set by the courts to the significance of the word "*any*."

Stroud's Judicial Dictionary and the English and American Encyclopædia of Law, each under the word "any," refer to English and American cases.

But this court has laid down the rule of construction in *United States* v. *Kirby*, 7 Wall., 486, where it has said:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. (See, too, *Holy Trinity Church* v. *United States*, 143 U. S., 462.)

"Any matter under inquiry" means any matter within the jurisdiction of the House or Senate, before them for consideration and proper for their action.

"Any question pertinent to the question under inquiry" implies any proper question.

So, a witness refusing to testify to any fact, or to produce any paper, implies a fact or a paper proper for him to disclose.

Second. That they are unconstitutional, because they are in derogation of a prerogative of the Senate. That the Senate is the exclusive custodian of its own dignity and authority and conservator of its own peace and order, in virtue of Article I, section 5, United States Constitution, which provides that:

> Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

That this act of Congress seeks to divest the Senate of this exclusive authority by dividing it with the courts. But this view plainly results from a confusion of ideas.

The title to the act of 1857 is, "An act *more effectually* to enforce the attendance of witnesses on the summons of either House of Congress and to compel them to discover testimony."

The refusal of a witness before a committee of Congress to answer a proper question put to him may become a contempt of the House which appointed the committee. But because that act of recusancy may become an offense against the jurisdiction of the Senate does not preclude Congress from constituting the same act an offense against the jurisdiction of the United States.

A person, to be sure, shall not "be subject for the same *offense* to be twice put in jeopardy of life or limb;" but a person may commit an act which is at once several offenses against one or more jurisdictions.

A statute prohibits the sale of liquor without a license, another statute prohibits the sale of liquor on Sunday, a third statute prohibits the sale of liquor to a minor. Each statute imposes a separate and different penalty. A man having no license to sell liquors, does sell liquor on Sunday to a minor. There can be no doubt of his having committed three separate offenses and subjected himself to three consecutive penalties.

A burglar breaks into a dwelling house in the city of Alexandria in the nighttime. He is indicted, tried, and convicted under the statute of Virginia for burglary. But the dwelling house which he has burglariously entered was also a post-office of the United States, and a Federal statute imposes a very different penalty upon one guilty of that offense. Can he plead one conviction in bar of another?

Congress has the constitutional power to declare what shall be misdemeanors in the District of Columbia, and it has here, in most solemn form, declared that the refusal of a witness to testify before a committee of Congress shall be not a contempt of that body, but a misdemeanor against the United States.

Contempts of court have always been deemed to be misdemeanors. It was early held indictable to disobey a judicial order. (1 Bishop, Crim. Law, sec. 240.)

Such contempts are in the nature of a breach of the peace. (*Ex parte* Whitchurch, 1 Atk., 55.)

It is noticeable that in discussions before the court the argument has almost uniformly, if not always, been to the effect that statutes, like this in question, are not only constitutional, but that they afford the only method through which contempts such as this may be lawfully punished.

This was the position in the McDonald case, a statute of New York being quite similar to this section 102.

DID CONGRESS, BY THE ACT OF 1857, DIVEST EITHER HOUSE OF ITS POWER TO PUNISH FOR CONTEMPTS?

This act does not purport to strip the Senate of its power to punish for contempts. That power remains to it within the limits laid down in *Kilbourn* v. *Thompson*.

Proceedings for contempt and by indictment for the offense are entirely distinct, and neither proceeding is a bar to the other. They may be cumulative.

1 Bish. Cr. Law, sec. 1067.
State v. *Woodfin* (5 Iredell (N. C.), 199).
State v. *Williams* (2 Spears (S. C.), 22).
Foster v. *Com.* (8 Watts and S., 77).
Yates v. *Lansing* (9 Johns, 395).

In the case last cited, Platt, Senator, said (p. 217):

> A contempt is an offense against the court as an organ of public justice, and a court rightfully punishes with summary conviction, and whether the same act be punishable as a crime or misdemeanor on indictment or not. To challenge a Senator or a judge may, under certain circumstances, be a contempt, but it is certainly indictable. A conviction on indictment will not purge the contempt, nor will a conviction for a contempt be a bar to an indictment. The offense may be double, and so are the remedy and the punishment. For instance, assaults in the presence of the court, rescues, expressions of libel upon the court or its suitors relating to suits pending, forging a writ, etc., are indictable offenses, and certainly they are also contempts. Contempts are never merged in statute offenses without express words for that purpose.

So also it is held that an act may be made indictable and punishable by both State law and Federal law. (*Fox* v. *Ohio*, 5 Howard, 410.)

So there is distinct authority in this District in the case of Samuel Houston, who, having been punished by the House of Representatives for an assault committed in the presence of the House, was afterwards indicted, convicted, and punished in the courts of the District for the same assault. (Vol. 2, Op. Atty. Gen., p. 668.)

Third. This petitioner has never been convicted, tried, or indicted for a contempt of the Senate. Indeed, so far as the record discloses, he has never been guilty of a contempt of the Senate. For that, it was necessary that he should have been brought before the Senate and the questions repeated to him which he had refused to answer

before the committee, and an opportunity afforded him of answering there. Only his refusal to answer there would subject him to the penalties of a contempt.

He was indicted for a misdemeanor "against the peace and Government of the United States." He was tried and convicted of this offense alone. The element of *contempt* in no degree entered into the case.

Congress has the power to declare the refusal of a witness to testify in court, before a grand jury, or before a master in chancery, or before any officer or agent of the Government charged with judicial functions and empowered by law to summon witnesses and interrogate them, a misdemeanor.

THE SUBJECT-MATTER OF THE INQUIRY WITH WHICH THE COMMITTEE OF THE SENATE WAS CHARGED, WAS WITHIN THE JURISDICTION OF THAT BODY AND PROPER FOR THE EXERCISE OF THAT JURISDICTION.

It very nearly concerned the integrity of that body. Charges of bribery and corruption had been made against its members. The public press of the country gave utterance to these charges. They were spread broadcast throughout the land; and it became the Senate, in no perfunctory way, to institute an inquiry which might enable it to ascertain the truth, and if the charges were unfounded to vindicate itself before the country; or, if the charges were sustained, to purge itself by expelling the offending members.

It was in the course of this inquiry that the questions were propounded:

> Has the firm of Moore & Schley bought or sold what are known as sugar stocks during the month

of February, 1894, for or in the interest, direct or indirect, of any United States Senator?

This question, it is insisted, was an unwarranted intrusion into the private affairs of a citizen.

The question, it will be observed, does not seek to ascertain any facts as to the conduct, methods, extent, or details of the business of the firm, but only whether this firm, holding itself out to the public as an agent for buying and selling stocks, was employed by any Senator to buy or sell sugar stocks.

No Senator could object that the inquiry proposed an invasion of his private affairs; for all must admit that the Senate, through its committee, has the authority to make such investigation.

Where one is on trial under an indictment charging him with the forgery of a check, or knowingly using such check, a bank officer asked on the witness stand whether the accused had presented that check at his bank for payment, and demanded payment thereof, would not be permitted to avoid answering the question on the ground that it was an invasion of the private affairs of his bank.

A member of the House of Representatives was expelled for receiving pay for the appointment to a cadetship at West Point. If the proof had been that he had received a check in payment, could the bank officer refuse to state whether such check had been presented to his bank and paid to the member of the House?

In *Kilbourn* v. *Thompson*, Jay Cooke & Co. were indebted to the United States. On a suggestion that Cooke had an interest in, or a claim upon, a certain real-estate

pool in Washington City, of which Kilbourn was a member, the House of Representatives, through its committee, summoned Kilbourn as a witness and demanded that he should bring certain records, papers, and maps belonging to his association, and demanded that he should state before the committee the names and residences of five members of the real-estate pool.

Here was an inquiry into a subject-matter over which Congress had no rightful jurisdiction. It was usurping a province exclusively of the courts. The enforcement of Jay Cooke's liability to the Government and the garnishment of assets was a matter for judicial process. There was no connection whatever between the United States and the real-estate pool, nor any such relation between Jay Cooke and the real-estate pool as could justify Congress in inquiring into the character of such relation.

But here the case is wholly different. Specific charges of a grave and heinous character, publicly made against Senators in Congress, had been brought to the attention of the Senate. The Senate, by resolutions in which the charges were recited, appointed a committee to investigate them and to inquire whether the allegations made in said charges were true. The subject-matter was one within the jurisdiction and within the plain line of duty of the Senate. The course of procedure, adopted by the Senate and pursued by the committee, was reasonable and proper. The questions propounded to the witness were pertinent to the inquiry with which the committee was charged. It is difficult, if not impossible, to conceive a case in which an investigation of charges of

bribery and corruption on the part of a member of either House of Congress could be conducted without requiring persons by, through, or in connection with whom the transaction, in one or more of its stages, was had, to testify to the facts within their knowledge; and yet if the mere fact that they were in any degree connected with the matter makes such an inquiry an invasion of the private affairs of the witness, then all such investigations must be fruitless and vain.

In *Interstate Commerce* v. *Brimson* (154 U. S., 485) this court said:

> Except in the particular instances enumerated in the Constitution and considered in *Anderson* v. *Dunn* (6 Wheat., 204) and in *Kilbourn* v. *Thompson* (103 U. S., 168–190), of the exercise by either House of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or punishment, in order to compel the performance of a legal duty imposed by the United States, can only be exerted under the law of the land by a competent judicial tribunal having jurisdiction in the premises. (See *Whitcomb's Case* (120 Mass., 118) and authorities there cited.)

If under the resolution *it was possible* for the Senate to take subsequent action within its constitutional right, such as, for example, the expulsion of one of its members, the court will conclusively presume that it was the intention of the Senate so to act.

If an act may be valid or not according to circumstances, a court would be bound to presume that such circumstances existed as would make it valid. (*Talbot* v. *Hudson*, 16 Gray, 417.)

In a case very like the one at bar, and hereafter to be noticed in connection with other views of the case, the court said:

> We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended. The same principle which renders it the duty of the courts to hold legislative action illegal when it unduly encroaches upon the province of the judiciary forbids interference by the latter with the action of legislative bodies or the exercise of their discretion in matters within the range of their constitutional powers. (*People ex rel. McDonald* v. *Keeler*, 99 N. Y., *a*487.)

Starting, then, with the express constitutional power in the Senate to expel a member, and the presumption that it purposed to act within its powers, it would seem clear that the inquiry provided for by the resolution was within its right. One of the subjects of inquiry was "*whether any Senator has been or is speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.*" The investigation under this head was one touching the conduct of members of the Senate, and the passage of the resolution indicated the opinion of that body that such speculation in stocks, the value of which was liable to be affected by the efforts of votes of Senators,

was reprehensible in high degree and would, when established by proofs, meet with prompt and severe reprehension. *It might have punished such action by expulsion of the offender,* for the right to expel is not limited to cases where felonies or criminal misdemeanors are charged, but extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member. (Paschal's An. Const., p 87; 1 Story on Const., 838; 1 Bl. Com., 163.)

The two Houses of Congress have several times acted upon this rule of law necessary to the maintenance of their dignity. In 1797 William Blount was expelled from the Senate for the offense of attempting to "seduce from his duty an United States Indian interpreter and to employ him as an engine to alienate the affections and confidence of the Indians from the public officers residing among them." (Sergeant's Const. Law, p. 286 (1822).)

Commenting upon this case, Mr. Sergeant says:

> In the resolution the Senate declared him *guilty of a high misdemeanor,* although no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case. *And it seems no law existed to authorize such prosecution.*"

The court will also recall the cases of Patterson, expelled from the Senate for complicity in the Credit Mobilier scandal, and of Whittemore, expelled from the House of Representatives for having sold a cadetship at West Point.

In this connection we direct the attention of the court to the eloquent presentation of the reasons for maintain-

ing this right inviolate, to be found in the report of the committee in the case of John Smith, a Senator from Ohio, accused in 1807 of participating in the imputed treason of Aaron Burr. (1 Hall's Am. L. Jour., p. 459).

THE INDICTMENT WAS GOOD AND SUFFICIENT.

It was objected, on behalf of the petitioner, that the indictment should have set out that the certificate which was sent to the district attorney, signed by the President of the Senate, and with the seal of that body attached had been so sealed by the direction of the Senate, and this failure so to charge imports that the seal was attached without the authority and direction of the Senate.

The brief of Mr. Edmunds (p. 11) says:

> The question of law which these undisputed and expressly admitted facts raises is whether, in the absence of any and all action by the Senate, including its nonaction as to ordering the certificate to be sealed, it became and was, under said section 104, competent for the President of the Senate, under the seal of the Senate, to certify the said matters to the district attorney which are embraced in the said statute; and whether in the absence of such action by the Senate it was within the power and jurisdiction of the prosecutor to submit said matter to the grand jury for indictment.

The plain meaning of this point being that as section 104, Revised Statutes, provided *one* means by which the matter could be brought to the attention of the grand jury, to wit, a certification by the President of the Senate, under the seal of the Senate, to the district attorney for the District of Columbia, of the fact of the refusal

of the witness to answer a proper question, that this was in exclusion of all other possible means of bringing the matter to the attention of the grand jury.

That view, of course, is altogether unwarranted by anything in the language of the statute or by the reason of the case.

But if the view was sound, the application of it here would fail.

An indictment need not and should not recite all the antecedent steps that had been taken to bring the matter before the grand jury.

The statutes of many States provide for the arrest of an accused person on a warrant from a justice, and his imprisonment, or bail, to await the action of a grand jury; but never was it heard that the indictment recited these things.

The general rule of the Senate is as follows:

> *Resolved*, That the Secretary shall have the custody of the seal and shall use the same for the authentication of process, transcripts, copies, and certificates, whenever directed by the Senate.

[As this resolution appears in the brief of counsel, in support of the petition for a writ of certiorari (p. 10), it is so punctuated as to make the direction by the Senate apply to certificates alone.]

The appearance of the seal to a certificate of the President of the Senate is sufficient warrant of authenticity.

If the act of the Senate was performed in open session the Journals of that body are public documents to which the whole world has access, and of which the court must take judicial notice.

If the members of the committee of the Senate had gone in person to the district attorney, without any certificate whatever, and had by him been sent before the grand jury, and by their several testimony before that body had satisfied it that a witness had appeared before that committee, regularly appointed, to investigate a matter within the jurisdiction of the Senate, and that such witness had refused to answer a proper question put to him by that committee, and the grand jury had returned a bill of indictment against such recusant witness, on which he had been arraigned, tried, and convicted, can one reasonably insist that such conviction would be invalid because the knowledge was not communicated to the grand jury through a single channel afforded by the statute?

The duty with which the grand jury is charged is to make inquiry, first, as to whether offenses have been committed; and, secondly, as to the person by whom they were committed.

An anonymous communication before a grand jury, stating that an offense has been committed and giving the names of the persons by whom it was committed, may be acted upon by them, and if upon investigation the charges contained in the communication are sustained by competent and sufficient evidence, an indictment found from such suggestion is not for that cause invalid.

WILLFULLY.

It is impossible from the petition and the brief to ascertain exactly what ruling of the trial court is complained of under this head. (Brief for petitioner, p. 16.)

Section 102 of the Revised Statutes is quoted, and it appears that the indictment charged that the refusal of the defendant to answer the questions was "willful." The court permitted the defendant, when testifying in his own behalf, to state that in refusing to answer these questions he had acted in good faith. But it is said in the brief that the court instructed the jury that it had absolutely nothing to do with the question of good faith of the defendant in declining to answer.

It seems that the defendant offered a number of instructions, the effect of which was to leave to the determination of the jury the question whether the refusal of the defendant to answer the question was willful. The statute on the subject (sec. 102, R. S., above quoted) provides, as we have seen, that if any person summoned "to give testimony or produce papers upon any matter under inquiry before either House or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry," may be punished.

Observe, the "*willfully*" applies only to him who refuses "to give testimony or to produce papers." It does not extend to him who, having obeyed the summons and appeared before the committee, "refuses to answer any question," etc.

One may fail to appear in obedience to a summons, or fail to give testimony at all, without a willful purpose; but no one on the witness stand having a question intelligibly propounded to him can fail to respond without willful purpose.

But, it is claimed, that because the indictment avers that the refusal was willful, therefore willfulness became an element of the offense and involved in the issue which was committed to the jury.

Such averment in the indictment must be taken as mere matter of aggravation and wholly unnecessary to be proved.

> If an intent is unnecessarily alleged, it can not, as a rule, affect the validity of the indictment, nor need it be proved, for it will be rejected as surplusage. (Clark's Crim. Proc., p. 192 and pp. 331–332, citing *Rex* v. *Higgins*, 2 East., 5; see, too, Whar. Crim. Plead. and Ev., sec. 158; *Rex* v. *Jones*, 2 B. and Ad., 611.)

TENOR.

The indictment in charging the refusal of the witness to answer the questions propounded to him by the committee does so in the following manner, for example:

> * * * and did then and there, to wit, at the time and place last aforesaid, make a response to the said question of the tenor following, that is to say:
>
> "I decline to answer that question."

And the questions propounded to the witness are charged as follows:

> * * * The said Cushman K. Davis, on behalf of said committee, propounded to the said Elverton R. Chapman, as such witness as aforesaid, a question of the tenor following:

Although this question, with a kindred one growing out of a verbal reply given by the court to a question

addressed to it by the jury, are made the subjects of lengthy and earnest discussion in the "brief in support of petition for a writ of certiorari," yet the petition itself does not appear to charge this as one of the grounds of error for which it asks a review of the judgment of the courts below.

The indictment undoubtedly charges the questions propounded by the committee to Chapman as in the very words in which they were put. Both the questions and the answers are so charged, and, if as to preclude uncertainty, they appear there in quotation marks.

Mr. Chapman was examined in his own behalf before the jury on the trial of the case, and the Record of the case, when it was in this court (No. 999 of the October term, 1895, changed to No. 513 of the October term of 1896), shows, on p. 50, that said witness was also asked by the district attorney the following question:

> Were you not also asked this question on behalf of the committee by Senator Davis:
>
> "Is the firm of Moore & Schley at present carrying any sugar stock for the benefit of or in the interest, direct or indirect, of any United States Senator?"

And to said question the witness answered:

> "That question was substantially asked me. I can not testify that it is verbatim, but that question was asked," and further testified that in response to such question he said, "I decline to answer."
>
> Said witness further testified that after the stenographer's notes of his testimony before the committee were written out, he looked over and revised the same before they were printed in the report of the

committee, this being done for the purpose of giving him an opportunity, as he understood it, to make any corrections, if any were to be made. * * *

Q. You know of no divergence in any way?

A. No, sir.

Q. You will say to the best of your knowledge and belief the questions which are set forth here and which I have read to you were propounded to you in exactly that form? Is not that so?

A. I should say so.

Q. And the answers are set out here in exactly the form you gave them?

A. Substantially so.

It is agreed between counsel that the questions propounded to witness Chapman before the committee, and which are set out in the indictment as being the questions which he refused to answer, are set out in exactly the same form in the report of the committee shown to said witness in the course of of his examination aforesaid.

NOT A PROPER CASE FOR THE EXERCISE, BY THE SUPREME COURT OF THE UNITED STATES, OF ITS DISCRETIONARY POWER TO REVIEW BY CERTIORARI.

In *Lau Ow Bew* (141 U. S., 587), this court said:

> It is evident that it is solely questions of gravity and importance that the circuit court of appeals should certify to us for instruction; and that it is only when such questions are involved, that the power of this court to require a case, in which the judgment and decree of the court of appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this court to issue the writ applied for, in order

that the case may be reviewed and determined as if brought here on appeal or writ of error.

The facts of this case are already fully disclosed to the court.

The petitioner was indicted in a court of the District of Columbia. The indictment was demurred to upon all the grounds which are relied on here in support of this petition for habeas corpus and certiorari.

Those grounds were fully argued and considered in the trial court and in the court of appeals of the District of Columbia; and the demurrer was overruled.

The further exercise of jurisdiction by these courts was sought to be arrested by applications to this court for writs of prohibition and of habeas corpus, in which these same questions were fully presented for consideration by this court and the applications denied.

The trial of the petitioner on the indictment was proceeded with in the lower court. All of these questions were again fully presented there, in support of objections to the jurisdiction of the court, in instructions to the jury, and motions in arrest of judgment. But the petitioner was convicted and came on writ of error to the court of appeals of the District of Columbia, where the same questions were again presented and relied on in support of assignments of error. But that court affirmed the judgment of the supreme court of the District in an opinion delivered by Mr. Justice Morris, a copy of which is herewith appended to this brief.

No judge before whom these questions have thus so often come has ever dissented. The consensus of opinion is complete.

What is there then in this case which distinguishes it by the tests suggested in Lau Ow Bew and entitles it to the extraordinary remedy of certiorari?

The petitioner has been surrounded by every means of protection known to the law.

Four judges of the lower courts have concurred in the opinion that the grounds of error relied on here are deceitful and vain.

No single dissent affords ground for the conjecture that unappreciated error may somewhere lurk in the reasonings or conclusions of the courts.

The vast array of precedents cited by counsel to support the several grounds on which they here rely preclude the suggestion of novelty in the questions which it is sought to bring up for review.

No excessive harshness in the punishment imposed commends this case as one proper, on that account, for the exercise of the discretion of this court in the employment of the writ here prayed. The lightest punishment which the statute allows is the one imposed.

As to the suggestion that the act of Congress under which the indictment was found and the conviction had thereon were in violation of the Constitution of the United States.

> The writ of certiorari will not be granted for technical formalities in a record, which neither affect injuriously the rights of any citizen nor are prejudicial to the public interest. And before granting the writ the court will look into the record and the circumstances attending the process; and if the error is such as does not affect the substantial justice of

the case, but is in the form of procedure only, the writ will be refused. (2 Spelling, Extraordinary Relief, sec. 1897, citing many cases.)

It may be true that no other case has ever come before this court presenting the question of the power of a committee of Congress to require a witness before it to answer such questions as were propounded to this petitioner. But chapter 7, Title II, Revised Statutes of the United States, is clear and distinct as to the existence of power; and *Kilbourn* v. *Thompson* (103 U. S., 168); *Interstate Commerce Commission* v. *Brinson* (154 U. S., 485); *People* v. *Sharp* (107 N. Y., 445); *People* v. *Keeler* (32 Hun., 583); *Hovey* v. *Foster* (118 Ind., 508) seem to be conclusive as to the frequency of its exercise in Federal and State legislatures.

If awarded in this case, it is not seen how the writ of certiorari can hereafter be denied in any criminal case which may be marked by novel and startling characteristics and in which the accused, after exhausting the jurisdiction of all the inferior courts and employing all the remedial writs known to the law, comes at last to this court, praying to have the proceedings of the lower court reviewed because his case is to him very "grave and important."

HOLMES CONRAD,
Solicitor-General.

APPENDIX.

ELVERTON R. CHAPMAN, APPELLANT, v. THE UNITED STATES.

CONSTITUTIONAL LAW; PROSECUTION UNDER SECTION 102, R. S. U. S.; TWICE IN JEOPARDY; STATUTE CONSTRUED.

1. Sec. 104, R. S. U. S., authorizes and makes it mandatory upon the President of the Senate to certify the contumacy of a witness summoned to testify before a committee of that body, and for that purpose to use the seal of the Senate.
2. No action by the Senate on the report of its committee is required as preliminary to the attachment of its seal or to certification by the President to the district attorney.
3. In a prosecution under sec. 102, R. S. U. S., it is not necessary to allege in the indictment or to make proof at the trial that action was had by the President of the Senate or that a certificate was sent by him to the district attorney and by the latter laid before the grand jury.
4. The inquiry directed to be made by the Senate resolution being a proper inquiry, and within the constitutional right and authority of the Senate to make, and the questions propounded to the appellant being pertinent, there was no unreasonable search into the private affairs of the witness, and no violation of the provisions of the Fourth Amendment of the Constitution.
5. In a court of justice, or in any body authorized to institute a judicial inquiry, as was the Senate in this case, no private affairs pertinent to the subject of inquiry are too sacred to be the subject of examination, unless protected upon some ground of privilege.
6. Nor is the prosecution in the present case in violation of the Fifth Amendment of the Constitution, providing that no person shall be subject for the same offense to be twice put in jeopardy of life or limb—the appellant not having in fact been twice put in jeopardy, and there being now no possibility of his being twice put in jeopardy for this offense.
7. *Quære* whether the constitutional provision as to being twice put in jeopardy has any application to cases like the present.

8. Where a witness summoned to appear and testify before a committee of the Senate refuses to answer questions pertinent to the subject under inquiry, the refusal necessarily implies willfulness in a legal sense, and the question of bad faith or evil intent is of no consequence whatever; and the trial court was right in disregarding the question of appellant's willfulness as one of fact for the jury.

No. 550. Decided April 7, 1896.

Appeal from judgment of supreme court of District of Columbia, holding a criminal court, Crim. No. 19985, entered upon the verdict of a jury finding appellant guilty under an indictment for refusal to testify before a committee of the Senate. Affirmed.

Messrs. Shellabarger & Wilson, Mr. George F. Edmunds, and Mr. A. J. Dittenhoefer for the appellant.

Mr. A. A. Birney, U. S. Attorney for the District of Columbia, for the United States.

Mr. Justice Morris delivered the opinion of the court:

This is the second appeal in this case. The case was formerly before us on an appeal specially allowed from an order of the supreme court of the District of Columbia overruling a demurrer to the indictment; and we then affirmed that order and sustained the validity of the indictment. The case being remanded to the court below came on in due time for trial; and upon trial the appellant was found guilty under the indictment. Upon exceptions taken to the rulings of the trial court and from an order overruling a motion in arrest of judgment the present appeal has been prosecuted.

The case was stated in full in the opinion of the court upon the former appeal (23 Wash. Law Rep., 17), and need not be here stated again. Only the questions raised by the rulings of the trial court and set forth in the thirty-nine assignments of error filed in the cause need be stated, and these even may be grouped in a few groups and so considered together; for the exceptions and the assignments of error only raise a few questions in many

different ways. The assignments, in fact, have been grouped in the brief of counsel for the appellant under five different heads, as follows: (1) Those relating to jurisdiction; (2) those relating to the element of willfulness as applicable to the case; (3) those having reference to the alleged variance between the allegations and the proofs; (4) those relating to the matter of surplusage in the indictment; and (5) those having reference to the instructions given by the court to the jury, as well as to those which were refused to be given. These will be noticed in their order as just stated.

1. And first it is proper to consider the question of jurisdiction. And this question, it is claimed, is raised in various ways, and upon different considerations from those which were before us upon the former appeal, although the question was then fully considered and passed upon, and we do not see that the developments at the trial have at all altered the conditions upon which our former decision was based. That decision we have no desire to modify in any manner whatever.

But it is offered to be proved now on the part of the defendant or appellant that the conditions, which under the demurrer in the former appeal were assumed to exist, did not in fact exist, to give the grand jury the right to find an indictment; and those conditions are that, as it is claimed, the matter had never been duly certified by the Senate of the United States to the District Attorney for the purpose of its being brought before the grand jury. This contention is based upon the theory that the Senate took no action in the premises; that therefore it never authorized its seal to be attached to the certificate of the matter that was sent to the district attorney; and that, if the seal of the Senate was in fact attached to such certificate, it was so attached without the authority of the Senate and against its rules. But this theory is wholly fallacious.

Apart from the question whether, under ordinary circumstances, it is proper to inquire whether documents apparently duly certified by the proper officers of the Houses of Congress have in fact been certified by the authority of those Houses, which, if answered in the negative, would seem to preclude any such inquiry as that here suggested, we are entirely satisfied that the contention of the appellant is untenable and can not be sustained.

Section 104 of the Revised Statutes of the United States, which is one of the three sections involved in this controversy, and which, so far as concerns the point now under consideration, is valid beyond all controversy, provides that "whenever a witness summoned as mentioned in section 102 fails to testify, and the facts are reported to either House, the President of the Senate, or the Speaker of the House, as the case may be, shall certify the fact, under the seal of the Senate or House, to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

Here there is not only plain authority, but an unmistakable mandate to the President of the Senate to certify the fact of the contumacy of a witness, and for that purpose to use the seal of the Senate. It is argued, it is true, that this statute is an unauthorized interference with the constitutional power of either House of Congress to make its own rules and regulations for the conduct of its business; but it is not apparent that a rule is any the less a rule because it takes the form of a statute, or that a direction by the Senate to its President to use its seal in a certain contingency is any the less valid because the other branch of the legislative power has concurred in the direction. If the conditions were reversed, and the Senate or House of Representatives sought by a rule to contravene the direction of some

statute having reference to the regulation of their business, the question might be presented which is sought to be raised here on behalf of the appellant. But no such question can properly arise when the rule and the statute are in unison, as they are here. For the rule of the Senate provides "That the secretary shall have the custody of the seal, and shall use the same for the authentication of process, transcripts, copies, and *certificates, whenever directed by the Senate;* and may use the same to authenticate copies of such papers and documents in his office as he may lawfully give copies of;" and the Senate has already given the required directions by its concurrence in the statute providing for the use of its seal in the special emergency contemplated in section 104. We fail to see where there was any want of authority for the attachment of the seal of the Senate.

We fail also to see wherein any action by the Senate upon the report of its committee was required as a preliminary to the attachment of its seal or to certification by the President of the Senate to the district attorney. No action is required or contemplated by the statute. It might possibly be that adverse action by the Senate undoing the work of its committee might prevent the President of that body from certifying the contumacy to the district attorney, as prescribed by the statute. But in view of the specific provisions of the statute, which the Senate must be presumed to have had in mind, in action must be regarded as the equivalent of a resolution to let the law take its course.

Nor is it apparent to us that there is any necessity for allegation in the indictment or for proof at the trial that action was had by the President of the Senate or that a certificate was sent by him to the district attorney and was laid by the latter before the grand jury. The transmission of a certificate by the President is a proper preliminary in such cases to set the wheels of justice in motion;

because otherwise the district attorney may not know that an offense has been committed. But no more in this case than in the case of any other offense against the law can it reasonably be required that the steps usually preliminary to indictment should be either stated or proved. In order to maintain the validity of an indictment and to sustain a conviction thereunder, it is not necessary in ordinary cases either to allege or prove either the arrest of the accused or the swearing out of a warrant against him, or the examination of witnesses before a grand jury, or any other of the processes usual before indictment. And there does not seem to be any good reason for a different rule in the present case. The offense, if offense there was under the statute, plainly was complete when the accused refused to answer the questions put to him, subject, of course, to the qualification that the questions were pertinent to the matter under inquiry, and subject also to the possible qualification that the committee or Senate might withdraw its questions, or that the accused at any time before the President of the Senate transmitted his certificate to the district attorney might be permitted to purge himself of the contempt and to answer the questions propounded to him.

The offense in question is one which comes within the category of offenses against the administration of public justice. The refusal of the appellant in this case to answer the questions put to him is not different in principle from a similar refusal to answer a proper interrogatory upon a trial in a court of justice. Such refusal in a court of justice is characterized as a contempt of court, to be punished in accordance with the inherent power of a court to punish contempts of its authority; and in some jurisdictions it is made a criminal offense to be punished in accordance with the usual course of the criminal law. But in all cases, although the offense is in a certain sense complete as soon as the refusal occurs,

yet it is an offense from its nature affording a *locus penitentiæ*, and to be condoned by the authority against which it is committed if in due season the party recedes from it in such manner as that his repentance may be available to serve the ends of justice in the inquiry then in progress. But the locus penitentiæ in the present instance was at an end when, upon the report of the committee to the Senate, the appellant still remained contumacious, and the certificate of contumacy was sent out by the President of the Senate. It was not, however, incumbent on the prosecution to show that the defendant had remained contumacious, but on the defendant to show the contrary, if such had been the fact.

But a more serious question is presented by the claim now made on behalf of the appellant that the prosecution against him is in violation of the Fourth and Fifth Amendments of the Constitution of the United States. The gravity of this question, involving, as it does, both the personal liberty of the citizen and the highest prerogatives of the legislature of the Union, demands that it should receive our most earnest consideration.

It is argued, in the first place, that the Fourth Amendment of the Constitution, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated," protected the appellant in this case, when appearing as a witness before the committee of the Senate, from answering the questions propounded to him by that committee. It is claimed that the inquiry then pending was not of the character which the Senate was authorized to institute; that it was entirely lawful, however improper or in bad taste it might be, for Senators to speculate in so-called sugar stocks during the pendency of the tariff bill before the Senate; that the inquiry was justified only on the theory that Senators so offending might properly be expelled

from the Senate; that it would be a tyrannical and wicked proceeding and not in accordance with the spirit of the Constitution to expel a Senator for any such cause; and that therefore no statute or court could aid the Senate in such work of expulsion by punishing a citizen who refuses to allow an inquiry into his private transactions based upon any such purpose. But it seems to us that this contention has already been disposed of so far as we may dispose of it, in our opinion on the former appeal in this case. There we held, with reference to this very provision of the Constitution, that the inquiry directed by the resolution of the Senate to be made by its committee was one proper to be made and within the constitutional right and authority of the Senate to make, and that the questions propounded to the appellant by the committee were pertinent to that inquiry. It necessarily followed that in propounding those questions there was no unreasonable search into the private affairs of the witness, and no constitutional guaranty was violated. And it is a fundamental principle of law, and one absolutely essential to the due administration of law, that in courts of justice or in any body authorized to institute a judicial inquiry, as the Senate was in this case, no private affair is too sacred to be the subject of examination if it is pertinent to the subject of inquiry, unless it is protected from examination upon some ground of privilege.

The argument for the defendant, however, is not now so much directed to the supposed immunity guaranteed by the Fourth Amendment to the Constitution as to that claimed to be afforded by the Fifth Amendment. The contention here is that the statute of January 24, 1857 (11 Stat., 155), incorporated into the Revised Statutes of the United States as sections 102, 103, and 104, under which the present prosecution has been instituted, is in violation of the provision in the Fifth Amendment of the Constitution which declares that no person shall "be

subject for the same offense to be twice put in jeopardy of life or limb." It is argued that the Senate derives its rights and powers from the Constitution alone; that among these is the inherent right and power to punish contempts of its authority; that Congress had no right to take away this power and bestow it upon the courts of law; and that the statute, by attempting so to vest authority in the courts of law and by providing additional punishments for the offense, had the effect of putting a person twice in jeopardy for the same identical offense, or of subjecting him to be so put in jeopardy.

We do not deem it necessary to follow counsel in their very able and ingenious argument upon this point. It seems to us that it is sufficient answer to it that the appellant has not in fact been twice put in jeopardy, and can not now by any possibility be twice put in jeopardy for this offense. The case of *Anderson* v. *Dunn*, 6 Wheat., 204, which, although overruled in its main features by the decision in *Kilbourn* v. *Thompson*, 103 U. S., 168, yet undoubtedly remains as authority for the extent of the punishment which may be imposed by either House of Congress for contempt, holds that the extent of the punishing power which the deliberative assemblies of the Union may assume is the power of imprisonment, and that this necessarily terminates with their adjournment. The Senate, against whose authority the contempt in question was committed, together with the Congress of which it formed a part, has passed into history. The session or sessions during which the punishment for contempt might have been imposed, and for which the punishment might have continued, have long since come to an end; and the possibility of such punishment is now and forever absolutely precluded. It is impossible, therefore, in this instance, that the appellant should be subject to be twice put in jeopardy for the same offense. The question might now properly be raised if

the Senate had first exercised its power to punish for contempt and this prosecution had afterwards supervened; or if, after the termination of this prosecution, the Senate should assume to impose its own punishment as for a contempt. But a statute can not be held unconstitutional because it may happen that, in its application, one may be subjected to be twice put in jeopardy for the same offense. It is the fact of being twice put in jeopardy, or the liability of an individual to be twice put upon trial for the same offense, that the Constitution prohibits, not the enactment of legislation that might, in its enforcement, in connection with other action, have the effect of imposing a double penalty for the same offense.

Moreover, it is questionable whether the constitutional provision is at all applicable to cases like the present. Contempt of the authority of Congress or of the authority of either of its Houses is of course an offense, but certainly such a contempt as the refusal to answer proper interrogatives in any inquiry pending before either House is not such an offense as was contemplated by the Fifth Amendment to the Constitution. The offense contemplated in the amendment is one for which the offender may be put upon trial in the ordinary courts of criminal jurisdiction, and where the plea of former acquittal or former conviction may be proper. The offense of refusing to answer an interrogatory, either in a court of justice or before one of the Houses of Congress, or before any committee of either House, is not an offense in the sense of the criminal law unless it is specially so made, as in this case, by statute, and its punishment as a contempt is not punishment in the legal or constitutional sense, but merely process in aid of the administration of justice. And this is so much the case that the contempt is held to be purged upon reconsideration of his action by the party in contempt and his consent to answer as required. The punishment for such contempt is in all cases

that the party stand committed to imprisonment until he consents to answer. This is not punishment or jeopardy, as contemplated by law, for an offense cognizable at law. And when the act of refusal to answer is made by statute an offense at law, then and then only is the person put in jeopardy in the sense of the Constitution.

2. It is claimed, in the second place, that, in order to sustain a valid conviction of the appellant, the element of willfulness must have been shown, and that it was necessary that it should appear that his refusal to answer the questions put to him was in bad faith and with evil intent. It is claimed for the appellant that he acted in the utmost good faith, upon the advice of learned counsel, on which he had the right to rely, and solely for the protection of what he believed to be his constitutional rights. Bad faith and evil intent, in the sense in which those terms are here used, are not charged against the appellant in the prosecution; and it is argued that, without the elements of criminality, there could not have been an offense here, in the legal sense of the term.

But the statute itself would seem to supply the answer to this argument. The statute (sec. 102) provides that "every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable," etc. Here the expression *willfully*, which is applied to qualify default in appearing in response to a summons, seems to have been studiously admitted as wholly superfluous and unnecessary in the qualification of a refusal to answer questions propounded. The refusal to answer necessarily implies willfulness in the legal sense, and the question of bad faith

or evil intent has no place whatever in the case. The purpose of the investigation is wholly frustrated by the refusal to answer, and the defeat of the public interest is complete, whatever may have been the motive of the witness in refusing to testify. For the purposes of the law, therefore, the actual intent of the witness is of no consequence whatever. But he was a person of mature years, a man of intelligence, and under no legal disability or disqualification, and he must be held to have contemplated the consequences of his own deliberate act. He must be held to have intended the result which followed his refusal, which was the defeat of the pending investigation, which failed for the want of such testimony as was sought from him, and, so far as that investigation was concerned, it was plainly a matter of no consequence that he may have believed himself to have been justified. His refusal to testify was a deliberate and willful act, all the more deliberate and willful because he took counsel upon the subject and took time to consider the consequences, and if such deliberate and willful act, in plain violation of the specific terms of the statute, does constitute an offense under the statute, unless there also superadded the element of moral guilt and deliberate purpose to violate the moral law, it would be simply impossible to procure any conviction under the statute, and the law would be no more than a dead letter.

Often, of course, the element of intent is a necessary ingredient of a criminal offense, essential to be alleged and essential to be proved. But from deliberate action in violation of law, the evil intent, not necessarily moral guilt, is always assumed. The evil intent which, on behalf of the appellant, is claimed here should have been shown, is the purpose to commit a moral wrong. It would be fatal to the existence of municipal law, certainly to the existence of all statutory law, if the guilt or innocence of one charged with the violation of its provisions were to

be determined by his purpose to do or not to do that which was wrong in the sense of the moral law.

We fail to find in any of the cases cited on behalf of the appellant anything that contravenes this position. The strongest of them on behalf of the appellant, and that on which most reliance is placed, is the case of *Potter* v. *United States*, 155 U. S., 438. But that case, in our opinion, does not sustain the appellant's contention. That was a case where the defendant, the cashier of a national bank, was indicted for unlawfully certifying a check in violation of the national banking act, when the drawer of the check had no funds on deposit, the provision of the national banking act being in specific terms that any officer of a national banking association who should *willfully* violate any provision of the act should be deemed guilty of a misdemeanor. It was held by the Supreme Court of the United States that the action of the officer must appear to have been done *willfully*, in the terms of the statute, and that is, with evil intent or an intent to defraud the association or its depositors or creditors, in order to render him guilty of a misdemeanor. But, as the court is at pains to point out, the act of certifying a check where there is no deposit is not of itself a fraudulent or illegal act from which willfulness may be inferred. As the court says, it might be merely part of a transaction involving a loan upon security from day to day; and the statute itself recognizes the fact that the act in itself is not illegal or wrong, because by express language it only makes it a misdemeanor when it is done *willfully* and for the purpose of perpetrating a fraud. No such distinction can arise where the statute necessarily implies willfulness from the nature of the act done, and where, consequently, it omits all qualification of express willfulness.

Failure to appear in response to a summons may well be due to other causes than willfulness or a deliberate purpose to disobey the mandate of the law; and it would

have been manifestly unjust to constitute it a misdemeanor unless it was done willfully. Hence arises the propriety of that qualification in the statute. But refusal upon examination to answer a pertinent question is in its nature a deliberate and willful act; and it is all the more deliberate and willful when counsel has been taken and there has been full consideration of the consequences of persistence in the refusal. A requirement of the statute that such refusal should not be regarded as a misdemeanor unless it were willful, or a construction of the statute that imports into this clause the qualification of willfulness properly affixed to the previous clause, would in our opinion be an absurdity.

The refusal to answer being, therefore, in its nature a deliberate and willful act, and being denounced by the statute as a misdemeanor, it can not avail a recusant witness that he may have believed himself to have been only asserting a constitutional right. If he was mistaken in his belief, however honest in a moral sense that belief may have been, and the statute is a valid exercise of the legislative power, it is beyond question that his mistake will not excuse him for his violation of the law. For a mistake of the criminal law will not excuse any man, any more than will ignorance of it. Any different theory would be destructive of all the safeguards of society.

We are of opinion that none of the cases cited on behalf of the appellant are applicable to this case, and that the trial court was right in disregarding the question of the appellant's willfulness as one of fact to be submitted to the jury.

3. With reference to the other questions raised—namely, the alleged variance between the allegations of the indictment and the proof on the trial, the question of surplusage in the indictment, and the instructions given and refused—we have given them all careful consideration; but we find nothing in any of them that would, in

our opinion, justify a disturbance of the judgment rendered in this case. We do not deem it necessary to consider any of these questions here in detail, for the reason that they seem to us to present nothing that has not already been well settled or disposed of, and that no good purpose could be subserved by an elaborate discussion of them. They mostly present in various forms the questions which we have already considered, and they are evidently not greatly relied upon by the appellant, on whose behalf the main argument has been on the question of willfulness and the constitutional questions supposed to be involved.

We find no error committed in the trial of this case, and we must *affirm the judgment. And it is so ordered.*

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